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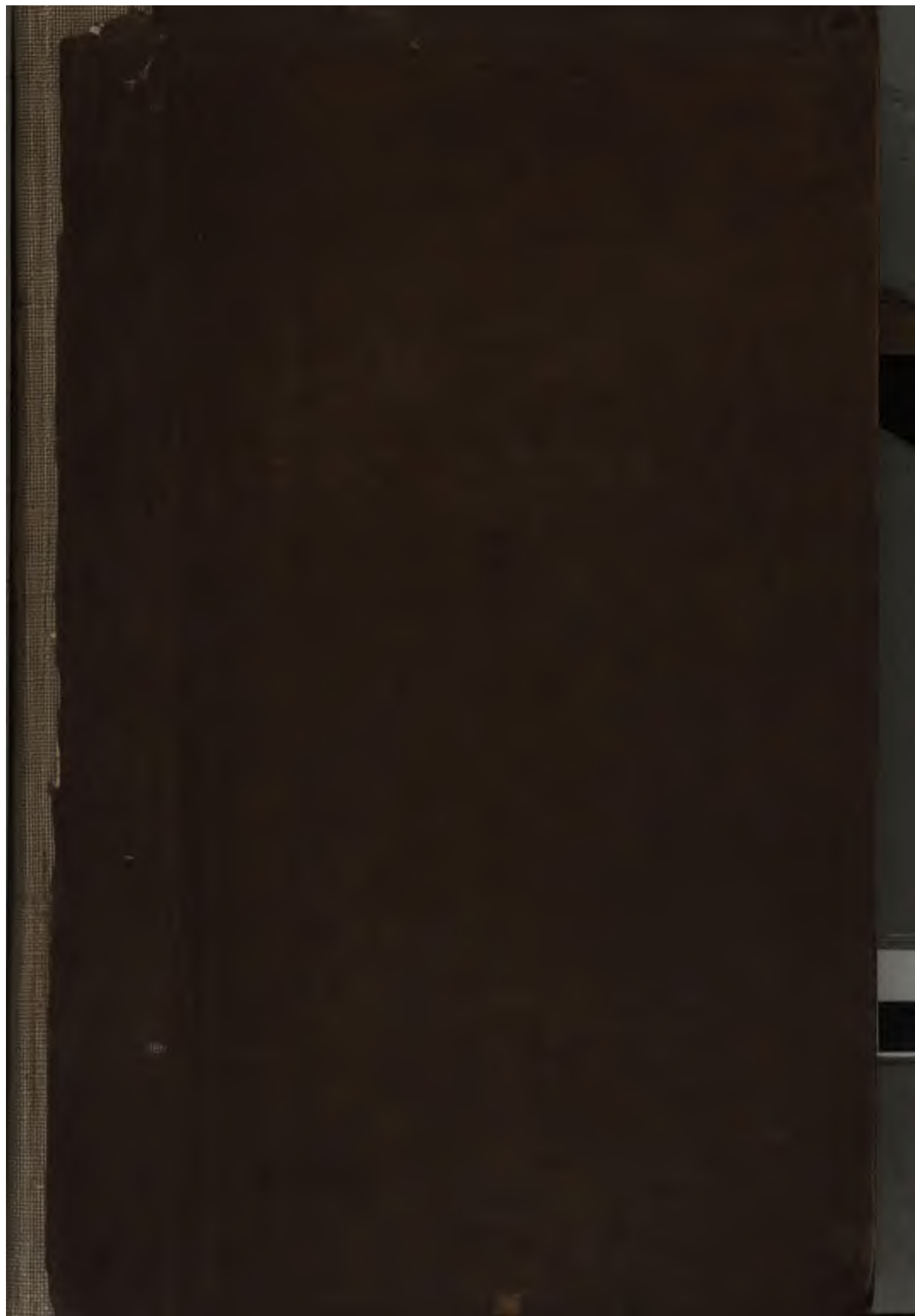
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SELECT CASES

DECIDED BY

LORD BROUGHAM

IN

The Court of Chancery,

IN THE

YEARS 1833 & 1834.

EDITED

FROM HIS LORDSHIP'S ORIGINAL MANUSCRIPTS,

BY

CHARLES PURTON COOPER, ESQ.

OF LINCOLN'S INN, BARRISTER AT LAW.


VOL. I.

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P R E F A C E

TO

VOLUME I.

“LA plupart aussi de ces *reports* sont composés de décisions qui ne diffèrent en rien de celles qui sont déjà imprimées.” No volumes can be more liable than the present to this objection brought in my *Lettres sur la Cour de Chancellerie* against the modern Reports. The greatest part of the cases comprised in them have already been edited with great accuracy and ability by Mr. Mylne and Mr. Benjamin Keen, and in a form which, as it admits a fuller statement of facts, must always be deemed more satisfactory to the profession than that in which they now appear.

What, then, it will be asked, is the motive for this new publication ? And I must

frankly own my inability to make any reply to the question, except that this publication originates in a promise to a distinguished Jurist and Statesman of another country, who was desirous of possessing in a separate work authentic copies of all such Judgments of Lord Brougham, whilst presiding in the Court of Chancery, as had previously to the delivery been put into writing—a promise, hastily, and looking at my other occupations, imprudently given, but from the performance of which, for reasons that it is not necessary here to mention, I have not thought myself at liberty to withdraw.

As the written Judgments are alone the subject of my undertaking, it comprehends only the years 1833 and 1834 ; all the preceding Judgments, with three exceptions,* having, as it should seem, been pronounced from very brief and imperfect notes—at least no other materials have reached my hands.

* The manuscripts of these Judgments were mislaid at the time when this volume was put to press. In order that the chronological arrangement which I have adopted may not be interrupted, they are designed to make an Appendix to Vol. II.

It will be seen that the Cases now published are entitled "Select,"—a term which, without explanation, is calculated to mislead. The utility of a Judgment, as a judicial precedent, is by no means the criterion by which I have been guided in my choice. It was the wish of the eminent individual, to whom I have above alluded, that all Judgments should be inserted, which, from the recital of circumstances contained in them, or from the short abstract prepared from the papers in my possession, would be intelligible to the reader, although affording nothing more than specimens, either of Lord Brougham's mode of sifting and combining facts, and reasoning upon them, or of his Juridical style. Hence some few Judgments will be found in these volumes which Mr. Mylne and Mr. Keen have very properly rejected, as being altogether foreign to the legitimate object of Equity Reports.

The tediousness of correcting the press of this first volume I have found means to diversify, by following to their sources in the Civil and Feudal Laws the doctrines involved

in some of the most important decisions ; and it was my intention to prefix the notes made by me on these heads by way of introduction ; but they were unfinished at the end of the period which I had set apart for the fulfilment of my editorial task, and I have not since had a single opportunity of touching them. The notes in question, therefore, should they ever be put forth, must be reserved for the second volume, the whole of which is in type, although there is no prospect of my being able to revise it for some months to come.

C. P. C.

LINCOLN'S INN,
November 30, 1835.

ERRATA.

THE two following errors of the press have been discovered on accidental reference :—

Page 65, line 26, instead of “an heir is in before admittance and surrender,” read “an heir is in before admittance and may surrender.”

Page 183, line 28, instead of “for what sum is the verdict in such a case to be marked,” read “for what sum is the writ in such a case to be marked.”

ALPHABETICAL

LIST OF CASES IN VOL. I.

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A jointress, having a rent-charge secured in the usual way by a trust term, concurred in selling and conveying the estate exonerated therefrom, a part of the purchase-money being laid out in the navy 5 per cents., the dividends of which she by deed declared she accepted in full discharge or satisfaction of such rent-charge. The income of this investment having, by the successive conversion of the navy 5 per cents. into 4 per cents. and 3½ per cents., become less than the amount of the rent-charge, it was held that the jointress was entitled to have the deficiency supplied out of the corpus of the stock.

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Leasehold for years, being mentioned in former part of will, held to pass by the residuary devise in which, although the word "leasehold" occurred, yet unless extended beyond the last antecedent, it could have comprised only the leaseholds for lives.

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Joint stock companies not illegal because not incorporated.

A bill by a shareholder in such a company against the directors, charging them with fraud, &c. needs not pray a dissolution of the partnership, nor needs it make the other shareholders, nor the assignees of a bankrupt director, parties.

The shareholder in the company in question ought, looking at its rules, to have set forth more explicitly how he derived his title, and a demurrer for want of equity was therefore allowed. It seems, looking also at such rules, that the persons from whom he bought shares should have been parties. . . 270

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CASES IN CHANCERY.

WRIGHT v. GREEN.

By the 1st Will. 4, c. 36, sect. 15, rule 1, it is enacted, " That when a writ of attachment shall have duly issued against any defendant for contempt in not answering the bill, and such defendant shall not have been taken under such writ, and the sheriff of the county into which such writ shall have issued shall make a return of non est inventus to the same, the Court shall, upon motion by or on behalf of the plaintiff, (notice of which shall not be required,) order that the Serjeant-at-Arms attending the Court do apprehend such defendant and bring him to the bar of the Court to answer his contempt; and the same proceedings may thereupon be had as if such order had been made in the manner heretofore in use, provided that before such order shall in any such case be made, the plaintiff applying for the same shall be required to satisfy the Court, by the affidavit of the solicitor of the plaintiff, or of his town agent, if the writ of attachment was issued by such town agent, that due diligence was used to ascertain the place where such defendant was at the time of issuing such writ, and in endeavouring to apprehend such defendant under the same, and that the person suing forth such writ verily believed, at the time of suing forth the same, that such defendant was in the county into which such writ was issued."

The Serjeant-at-Arms having taken the defendant under the above rule, this motion was made to discharge him out of custody, on the ground of irregularity. The writ of attachment had been sued out by the plaintiff's town agent, who therefore made the affidavit upon which the order for the Serjeant-at-Arms proceeded. That affidavit stated circumstances from which it might be reasonably inferred that due diligence had been used to ascertain where the defendant was at the time of issuing the writ; and the town agent's belief that the defendant was in the county into which the writ was issued, at the date of issuing it. It did not however *expressly* state, either to the deponent's knowledge or belief, that due diligence had been used to effect the caption. The circumstances were contained in a copy of a letter from the officer employed in executing the writ set forth in the affidavit, and detailing two unsuccessful attempts to apprehend the defendant, and the contents of which letter the town agent swore he believed to be true. Such affidavit was held to be sufficient.

Jan. 28, 1833.

Form of the affidavit required by the 1 Will. 4, c. 36, sect. 15, rule 1, as a foundation for an order for the Serjeant-at-arms against a defendant in contempt for not answering.

LORD CHANCELLOR. — To warrant the order, the Court, (assuming the belief that at the time of suing forth the writ, the defendant was in the county into which the same was issued,) must be satisfied of these two facts; first, that due diligence has been used to ascertain the residence of the party; and, secondly, that due diligence has been used in endeavouring to apprehend him; and of this it can be satisfied in one way only, viz. by the affidavit of the plaintiff's solicitor, who sued out the writ; or if it were sued out by the town agent, then by the affidavit of that agent, swearing to the facts. But it is necessary for the affidavit to satisfy the Court of the facts; and whatever else it may contain, beyond the swearing to these naked

facts, can only be brought forward with a view to affording the required satisfaction. It was contended that something more than this should be done, namely, that the party making the affidavit should swear *to his belief* that due diligence had been used to ascertain the defendant's residence. But that is no part of the exigency of the rule in the statute; on the contrary, where the party's belief is required to be sworn to, as in the subsequent clause, with respect to the defendant being in the county into which the writ was issued at the time when it was sued forth, that is so presented in direct terms; and the difference in the language of the two clauses leaves no room for conjecturing what the intention of the legislature may have been.

The question then comes to be here, as it must be in every other case, whether the solicitor who has made affidavit to circumstances, though not within his own knowledge, and who has also complied with the exigency of the rule, in swearing to his belief that the defendant was in the county when the writ was sued forth, but who has not expressly sworn, as he was not required to swear, either to his knowledge or his belief that due diligence was used—whether that solicitor has not disclosed circumstances sufficient in reason to satisfy the Court that such diligence has really been used? The mode in which he has attempted to do so, is by setting forth in his affidavit a letter, received, as he swears, from the officer who endeavoured to make the caption, and in which the writer relates a number of par-

ticulars, the whole of which, taken together, satisfied the Court below, and I think correctly, that due diligence had been used : and he swears, moreover, to his belief, that the contents of that letter are true. It is said, indeed, that the letter might have been more precise and particular in its statements, but I must look at the whole of the affidavit together ; and, although I admit that it might have been more satisfactory, I am still disposed to think that, standing as it does quite uncontradicted, it ought to be deemed sufficient.

The case of *Miller v. Bennett*, with a note of which I have been furnished, turned upon circumstances entirely different. No question was raised there as to the propriety of the original order ; but an application was made before the Vice-Chancellor to have it set aside, upon further affidavits, showing that the Court had been imposed upon. In the present case, the motion is to discharge his Honor's order, on the ground of its having improperly issued in the first instance, and therefore I am not at liberty to take into view the affidavit subsequently made by the plaintiff's wife, contradicting the statements in the letter. The motion must be refused with costs.

ATTORNEY-GENERAL *v.* SMITHIES.

THE ensuing abstract contains every thing requisite to render the judgment intelligible.

By letters-patent of King James the First, dated the 9th October, in the eighth year of his reign, after reciting, among other things, that his Majesty, as well for the care which he had for the maintenance of the poor of his kingdom as from his wish to perform all offices of charity, was desirous to provide for the foundation of a certain ancient college or hospital in the suburbs of the town of Colchester, and the perpetual support thereof, and of the master and poor who should exist and be maintained in the same ; and that the manors and possessions which had been given to the college, should be converted to such pious uses :—It was ordained, that from thenceforth, and for ever, there should be one college or hospital of the poor, in the suburbs of the town of Colchester, for the relief and sustenance of the poor, and that it should consist for ever of one master and five poor ; and in order that his Majesty's intention might better take effect, and that the goods granted for the support of the college might be better governed for the preservation of the same, and for the support and maintenance of the master and poor, it was moreover ordained, that thenceforth, for ever, there should be one master of the hospital and of the possessions thereof, and he should have the cure of the souls of the parishioners of St. Mary Magdalen in Colchester, and he should celebrate divine service, either by himself or by some sufficient minister or curate : And further, that there should be five poor persons who alone, either men or women, should be supported, relieved and maintained in the college ; and that they should be called the Poor of the College or Hospital of King James ; and for their support, relief and maintenance, they should receive, through the hands of the master of the college, or of his assignees, annually 52*s.* at the four usual feasts. And his Majesty did thereby appoint Henry Davye,

one of his chaplains, to be master of the college, and of all goods and lands thereof, commanding that the same Henry Davye, as long as he should remain in the office of master, should celebrate divine service, either by himself or by a sufficient deputy, as well to the poor of the college, as to the parishioners of St. Mary Magdalen, in the parish church adjoining the said college. And his Majesty also appointed certain persons to be the first poor of the college, to continue therein during their lives, unless for any reasonable cause any of them should be removed; and power was given that such poor should be removed by the master for the time being, according to the statutes, as often as the case required it; and when any of the five poor should die, or be removed, power was given to the master to appoint others in their place, and the master and poor were thereby created a body corporate by the name of the Master and Poor of the College or Hospital of King James. And his Majesty granted to the master for the time being full power, together with the assent of the Attorney-General and Solicitor-General, or either of them, to make statutes and ordinances touching the government, election, expulsion, punishment, order, and direction of the master and poor, and to appoint any other things whatsoever touching the college, and the goods thereof: And it was thereby enjoined, that all the income of the possessions that had been formerly and should be thereafter given to the maintenance of the college, should be disposed and expended for the support of the master and poor, and for the support and repairs of the possessions of the college according to the statutes, and not otherwise.



Jan. 29, 1833.

An hospital was founded in 1611, consisting of one master and five poor, and the latter were to receive for their maintenance 52s. a year. The income having greatly increased, the master was, neverthe-

LORD CHANCELLOR.—The intention of the endowment is stated to be for the relief and sustentation of the college or hospital, and of the master and poor, to be and be maintained in the same; and the endowment then goes on to execute this intention, which is done thus: There is to be a college or hospital for ever, consisting of one master and five paupers. There is to be, a master

of the hospital, and of the goods and lands thereof, and there are to be five paupers *supported, relieved, and maintained* in the hospital: and then it states *how*—repeating the same words—they are to be supported, thus: for their support, relief, and maintenance, they are to have and receive, each of them, through the hands of the master, 52*s.*, to be paid by the said master at the four usual feasts. And they are incorporated by the name of “The Master and Poor of the College or Hospital of King James.” And after giving power to make bye-laws, with the assent of the Attorney and Solicitor-General, for the order and disposition of the charity estate, the endowment concludes by directing that the whole of the estate shall go to the support of the master and poor, and the maintaining and repairing of the house and possessions, and no otherwise.

less, held to be entitled to the whole augmentation.

There being then no dispute that the whole is given to the charity, the question is, whether the estate is given to the body, consisting of master and almsmen, subject to a payment of 52*s.* to the almsmen, or to the master and almsmen. In other words, whether the surplus shall go to the master, whose share is not fixed, or between him and the almsmen, notwithstanding that there appears an intent to fix and limit the shares of these.

Let us first ask (as it is always right to do where no fixed rule of law prevails) what is the plain and natural sense of such a gift? If I give the whole of an estate and other funds to several objects, and mention the proportions in which each shall take, no difficulty arises—they are

to divide the whole in those proportions. So if, without expressly stating that it shall be so divided, I so frame the gift as that no reasonable doubt can be entertained of such being my intention, it is the same thing. One most important indication of this intention is, when particular amounts are given to the different objects, and the whole shares taken together exhaust the fund. This is, in fact, the *Thetford School* case, in 8 Rep. 131, supposing the gift had been directly to the objects of the donor's bounty, and no feoffees had been interposed. For as that case stands, a question in later times—had the case been more recently decided—might have arisen as to a resulting trust: this at least was Lord Hardwicke's, and appears to have been Lord Erskine's opinion. But suppose the gift to be framed quite otherwise, and, instead of expressly apportioning the whole, or impliedly apportioning it, as by exhaustion or other indication of such an intention, I give the fund entirely to one body, subject to a certain payment to other parties:—these can only take what is given as a charge, and the surplus must be with the donee of the fund, unless there be circumstances clearly indicating a contrary intention. Nor is there any particular form in which alone the one object of the donor's bounty can be made the primary or principal donee, and the other only the secondary donee, or as it were the incumbrancer upon the fund. If the gift is of the whole entire fund to one, and the other is to receive so much a year out of its rents or profits—that clearly gives the surplus to the

first. Then, if the gift is to both, but so as one shall take yearly so much, is not this, in substance and effect, the same thing? The whole is given to both, not in fixed proportions, but with a certain amount to the one, and the unascertained residue to the other. It is distributed, and their shares are ascertained, not by division, but subtraction. Now, if you examine all the cases, both those to which I shall presently refer, and the others which are well known; those in *Ambler, Attorney-General v. Johnson*, (p. 190); and *Attorney-General v. Sparks*, (p. 201;) that of *Attorney-General v. Mayor of Coventry*, in 2 Vern. (p. 397), and also 7 Bro. P. C. (p. 235); and that of *Attorney-General v. Haberdashers' Company*, in 4 Bro. C. C. (p. 103,) you will find nothing that militates against this plain and natural construction, but much that supports it. Yet the case I have put is in substance the case at bar, for the intention of the gift is, for the relief and sustentation of the master and poor; and that intention is executed by erecting a college or hospital for the master and five paupers; the master to be trustee of the hospital, and of the goods, lands, &c. thereof, (which distinction further aids the argument in his behalf,) and the five paupers to receive for their support, relief and maintenance, 52s. each, through the hands of the master, and the funds are to go to the support of the master and paupers, and for repairs, and not otherwise. This certainly is at the least a gift of the whole to the master and paupers—the amount receivable by the latter being ascertained, that re-

ceivable by the former unascertained. In other words, the surplus being the master's, after paying the paupers and the repairs. It is clear that there is no middle course between this construction and one which would give the paupers, first, their fixed payment of so much a year, and then their share of the residue also.

The importance of the question, not only in itself, but its possible consequences, as well as the circumstance of my having the misfortune to differ with his Honor the Master of the Rolls in the opinion which I have formed, induces me further to consider the authorities that are supposed to bear upon the subject. An examination of these tends greatly, I think, to confirm the view which I take.

The *Thetford School* case proceeded upon grounds which are very material to be considered here. It was a devise of land to trustees for the maintenance of a preacher four days a-year, a master and usher of a school, and certain poor; and certain sums were given to each, *i. e.* preacher, master, usher, and poor, in all 35*l.*, which formed the whole of the rents and profits of the land devised. The first consideration of the Court therefore was, that the whole being given to the objects of the donor's bounty, the increase of the rents and profits should be divided among them for that reason, and that the fixed payments specified should not limit the amount of the shares, though it might ascertain the proportions in which those shares were to be received by them. The circumstance which raised this argument is not to be found in the present case. For here, to

one only of the objects, the alms-bodies, a sum is fixed, and the donor contemplates a surplus over that, and disposes not of it. But the other, and, according to the report, the principal reason of increasing the shares in the *Thetford* case, applies to increasing the master's share, though certainly not the shares of the five paupers. Lord Coke says, "The resolution is grounded upon evident and apparent reason, for as if the lands had decreased in value, the preacher, &c. should lose; so when the lands increase in value, *pari ratione*, they shall gain." How is it here? If the rents fall down to 13*l.* the paupers have it all, and the master has nothing; therefore by the argument in the *Thetford* case, he is entitled to the surplus, if any. Lord Eldon doubts if this be a sound principle, but he admits that the case in Coke has settled it as law, and that it cannot now be disturbed. In *Attorney-General v. Mayor of Bristol*, 2 Jac. & Walk. 294, Lord Eldon, after stating that no case has gone so far as to say that if a gift of lands takes notice of the portion of the rents allotted to a charitable use being less than the whole rents, the charity is entitled to the surplus, and referring to the case of *Attorney-General v. Arnold*, in Shower, (P.C. p. 22,) as showing that a gift to A. for charitable purposes, and then of fixed sums to charities, but not amounting to the whole rents, makes A. a trustee of the surplus for charitable purposes, to be ascertained by sign manual or by this Court—puts the case of A. being a charitable corporation, and asks, might it not be argued that the gift to A. of the

land and certain payments to be made out of it, would answer the intention, because one charity would take in land and another in money? I need hardly remark how very nearly the case here put by Lord Eldon approaches the present; indeed it is not distinguishable in principle. There can be no doubt that the opinion intimated in the words I have just read, must have extended to the view I am taking of this case, and that Lord Eldon would, upon the same ground, have thus disposed of it.

But the whole of the case of the *Attorney-General v. Mayor of Bristol* is deserving of the greatest attention in disposing of the present case. It was a declaration of trust by gift of money to the Corporation of Bristol, and a covenant by that Corporation to purchase lands and pay certain sums to different corporate bodies, in rotation, Bristol being one itself; and the question was, whether or not that corporation was a trustee of the surplus rents for those bodies. Lord Eldon delivered a most elaborate judgment—elaborate both as regarded the particulars of the case itself, into every detail of which he very minutely went, but also as regarded the other cases—leaving nothing to regret, except that by some accident he had not looked at the report of the leading case (the *Thetford School* case) in Lord Coke. Yet even in dealing with the imperfect report on which his observations are grounded, (and the imperfection relates only to an obiter dictum,) he seizes, with his wonted sagacity, upon the error, for the difference of opinion

which he expresses in the form of a query or doubt, clearly applies to that portion of the case in which there is a discrepancy between the two reports. The whole of his reasoning and remarks are important in their bearing upon the present question, and his decision appears to me distinctly to support the view which I am now taking. He held that the Corporation of Bristol was not a trustee of the surplus rents for the other corporations, upon the ground that Bristol was itself an object of the donor's bounty, and that the case fell within the range of those cases in which property is given to a corporate body, subject only to the charges imposed. Whoever reads the Bristol case attentively will perceive that there were several matters in it opposed to this construction, which exist not in the present case. Yet these matters, nevertheless, the Court got over.

I shall now take notice of a passage which has more than once been commented on in questions of this kind, and has been referred to upon the present occasion. In the *Thetford* case it was said that the resolution concerns the colleges in the Universities and elsewhere; "for in ancient times, when lands were of small yearly value, (victuals being then cheap,) and were given for the maintenance of poor scholars, &c. and that every scholar, &c. should have a penny or three halfpence a-day, that then such small allowance was competent in respect of the price of victuals and the yearly value of the land; and now, the price of victuals being increased, and with them the annual value of the lands, it

would be now injurious to allow a poor scholar only a penny or three halfpence, which cannot keep him, and to convert the residue to *private uses*, where, in right, the whole ought to be employed to the maintenance, or increase (if it may be) of such works of piety and charity which the founder has expressed, and nothing to any *private use*; for every college is seized in jure collegii, scilicet, to the intent that the members of the college should take the benefit, and that nothing should be converted to *private uses*." The question in this case was between the objects of the charity, the master of the school, and the devisees. But the case of the colleges put by the judgment was, as stated in Duke, and as stated by Lord Coke himself, somewhat different, and as if a right were given to the scholars against the college. This at least appears to have struck Lord Eldon as an interpretation of the passage; for he says, (*Attorney-General v. Mayor of Bristol*,) that if the text is to be understood thus, that where property has been given to found a college, and a distribution been made at the same time of all the rents to given members of the college, they must have an increase, as the times require—of that there can be no doubt. But, he adds, that there are many cases where land has been given of greater value than the amount of the charges for scholars, &c. and the surplus has been enjoyed by the college itself; and further, that if this were considered an improper application, it would disturb the distribution of the revenues of many colleges in both Universities. The report he

cites is that in Duke ; and the fuller one in Lord Coke makes it much more doubtful if any thing more was meant than that the whole gift should go for *public and collegiate purposes, private uses* being repeatedly put in contrast with them, three times in Lord Coke, and once in Duke. But there is a much more material difference between the two reports ; that in Duke puts the case of lands given not to the poor scholars, but to the college and scholars : “ The case did concern all colleges, for when the lands were first given for their maintenance, and that every scholar should have a penny-halfpenny a-day.” In Lord Coke it is land *given to the scholars*—“ When lands were *given for the maintenance of poor scholars*, and that every scholar should have a penny or three-halfpence a day.” It is plainly a very different thing to say that a gift of lands, or the rent of lands to maintain poor scholars, each having so much a day, is a gift to them of the whole, and entitles them to the surplus, and to say that a gift of land to a college for its maintenance, and that each scholar should have so much, entitles the scholar to a share of the surplus ultra the fixed sum. The former is in truth exactly the *Thetford School* case—the latter is a case not to be found decided either in that or in any other book. The former is the plain and definite proposition, that a gift of the whole fund in fixed proportions to different objects of the charity, vests the whole in those objects, in such proportions, to the exclusion of the trustees, through whose instrumentality the charitable purpose is to be

effected — the latter is the position not to be maintained in argument, and for which certainly no authority can be cited, that the gift of a fund to certain parties, all alike objects of charity, and specifying what some shall take without mentioning the others, in this respect, or establishing any proportion among them, entitles those whose shares are fixed to a share also of the residue. Had the words of Lord Coke's report been accurately attended to, it never could have been supposed that this doctrine derived any countenance from it. But we may further observe, that even had it been as in *Duke*, and as commented on, and indeed inter arguendum & obiter, dissented from by Lord Eldon, it is no decision—it is only an obiter dictum, agreeing with the barely possible bearing of the resolution in the case. The principal case itself (the *Thetford School* case) most clearly affords no countenance whatever to the doctrine.

It remains to consider whether there be any other circumstances connected with the present case which entitle us to give a different construction to the grant. To speculate upon intentions which may be supposed to exist respecting the paupers, inconsistent with the precise and defined purpose intimated as to them in their relation to the master, or the body of which they form a part, would be extremely unsafe, and could indeed lead to no satisfactory result. Such topics, on the one hand, are met and balanced by others of at least equal force and pertinency, as the station and functions of the master, both in the

hospital and in the church. But there is one particular which deserves much more attention, and appears to have greatly weighed with the Court below—the power given to make bye-laws, with the assent of the Attorney and Solicitor-Generals, for the ordering and disposing of the charity estates; I am of opinion, however, that this does not alter the position in which the case is left upon the construction of the rest of the instrument. First, because I take it, that in making such regulations it must always be understood that they shall not be inconsistent with the body of the rules laid down originally in the governing charter—the letters-patent themselves:—but next and principally, because no such disposition as it is contended ought now to be made of the revenues, has ever been made under the power referred to, and therefore the question is, whether or not the parties can now be compelled to make it, or the Court can make it for them. They can only be compelled if it be according to the intention of the donor;—they would only be justified in making it, uncompelled, if the donor's provisions allowed them, but they could only be called upon by the Court to make it, if those provisions required them to do so. It therefore occurs to me that this view of the question brings us back to the one first taken, and upon which the whole turns.

It is impossible, in cases of this description, to lay out of our view the length of time during which a certain arrangement has subsisted, and a certain meaning been given in practice, to the

instrument of foundation. If, indeed, the practice, though of centuries, has been a breach of trust, doubtless the lapse of time shall be no bar. But long adverse enjoyment is not to be thrown out of view in seeking for the true construction of the provisions under which both conflicting parties claim; and a principle of distribution under a known instrument of foundation, if long acquiesced in by all the objects of the bounty from whence the funds proceed, and to effectuate the purposes of which the instrument is framed, ought not, without manifest reason, to be disturbed. The rule of interpretation, from contemporaneous usage and long acquiescence, extends over every branch of the law, independently of its connexion with matter of limitation and bar. I speak not now of a course of dealing with charitable funds, in the absence of evidence respecting the original endowment, or in plain opposition to its provisions. But where the endowment is forthcoming, its construction may be aided by adverting to the long and uninterrupted acting under it, and acquiescence in that acting.

It may be added, that in all such cases of contest between the different objects of the founder's bounty, the proof seems reasonably and naturally to rest on the party setting up a fixed and restricted portion as alone due to his companions in the charity, and claiming the surplus for himself. Exclusion may not be presumed even from usage—but the usage may be a confirmation of the evidence which the instrument offers, that the exclusion was intended.

BOLTON v. CORPORATION OF LIVERPOOL.

OF this case the circumstances are sufficiently stated in the judgment.

Mr. Pepys and Mr. Kindersley for the plaintiffs. The Solicitor-General, Sir C. Wetherell, Sir E. Sugden, and Mr. Duckworth for the defendants.

LORD CHANCELLOR.—In this case, an action at law for tolls having been brought by the Corporation of Liverpool against the plaintiffs in equity, the question was touching the right of the plaintiffs, who were the defendants at law, to have certain documents, referred to in the schedules to the Corporation's answer, produced in aid of the defence at law, and those documents being of two descriptions, raised two separate questions: the one relating to papers of various kinds, evidencing the title of the Corporation to the town and lordship of Liverpool, and to the dues and customs in question; the other relating to cases and statements submitted to counsel in contemplation of and pending the present proceedings at law and in equity.

First, as to the documents evidencing title, I entertain the same view of the matter which his Honor the Vice-Chancellor did when he refused the application. I take the principle to be this:—A party has a right to the production of deeds sustaining his own title affirmatively, but not of those which, not being immediately connected with the support of his own title, form part of his adversary's.

Feb. 13, 1833.

A party has a right to the production of such deeds only as either sustain his own title exclusively, or sustain it jointly with that of his adversary. A party is not compellable to produce, for the purposes of an action or suit, cases laid before counsel in the progress of a cause, and prepared in contemplation of such action or suit.

He cannot call for those which, instead of supporting his title, defeat it by entitling his adversary. Those under which both claim he may have, or those under which he alone claims. Thus an heir at law cannot, in that character, call for the general inspection of deeds in the possession of a devisee. In *Lady Shaftesbury v. Arrowsmith*, 4 Ves.66, Lord Loughborough said he could not find any spark of equity for such an application as that; admitting that the heir in tail (and so he decided) had a right to inspect settlements creating estates in tail general; the party stating himself to be the heir of the body.

The plaintiff here does not claim at law any thing positively, or affirmatively, under the documents in question. He only defends himself against the claims of the Corporation, and suggests that the documents evidencing their title may aid his defence. How? By proving his title, he says. But how can these documents prove his title? Only by disclosing some defect in that of the Corporation. The description of the documents is, that they rebut or negative the plaintiff's title. They are the Corporation's title, and not his, and they are only his negatively, by failing to prove that of the Corporation. He rests on the right which he has in common with all mankind, to be exempt from dues and customs; and he says, "Prove me liable, if you can." The Corporation have certain documents which, they say, prove this liability. He cannot call for those documents merely because they may, upon inspection, be found not to prove his

liability, and so may help him and hurt his adversary, whose title they truly are.

The case of *The Princess of Wales v. Lord Liverpool*, 1 Swanst. 114. 580, was cited. It is, perhaps, a strong case, and so I take leave to observe it was felt to be at the time, but it is a peculiar one. Lord Eldon at first refused the application, and then granted it in the special circumstances. The instruments were two promissory notes, upon which the suit was brought against executors. Lord Eldon, in delivering judgment, threw out many observations as to what might appear on an inspection. The notes, he said, might be duplicates; they might have important variations; some question might arise on the stamps; and they might, at any rate, said his Lordship, be given up at the hearing; for an indemnity will not do; at least that is questionable. Yet he held all this matter of surmise not to be enough; for he required the defendant to state in what respect the inspection of the notes was material for his defence, and upon affidavits of circumstances impeaching their genuineness, he thought enough appeared to warrant an order that the defendant should not be compelled to answer till he had obtained the inspection. It must be admitted that there the thing sought, and in substance allowed to be inspected, was not any matter collateral, but the very instruments on which the title of the plaintiff rested, and which could only be the title of the defendant by failing to support that of the plaintiff. His Lordship may have considered the instru-

ments as a sort of title common to both parties ; but it could only be so by the one party setting them up, and the other impeaching them on flaws discoverable by inspection. It must, however, be observed, that this was a kind of case in which, at law, inspection would have been given, as a matter of course, by an order at chambers ; and the party obtaining the order would even have been allowed to have the notes examined by the witnesses whom he intended to call, with the view of impeaching them.

In this case, therefore, I can, upon the whole, see no reason for coming to a different conclusion from that at which his Honor arrived when he refused inspection of the Corporation's title, as being theirs, and not the plaintiff's, and not common to both.

Next, with respect to the cases sought to be inspected, these are the cases laid before counsel in contemplation of the action, and pending the proceedings. Their dates come down to the 29th October, 1831, the bill having been filed in November, 1830, and the answer sworn in December, 1831. Most of the cases were laid before counsel after the demurrer was argued ; nay, after it came before me on appeal—some of them on the very eve of the present application to the Vice-Chancellor. They are sworn in the answer “to have been prepared in contemplation of and with reference to the action and suit.” It is suggested, that one of them is the very brief for counsel at the trial of the action, to prepare himself against which the plaintiff in equity claims the inspec-

tion. And whether this be so, in point of fact, or not, is immaterial, as it may well occur in any cause, if the cases laid before counsel in reference to that cause at law can be obtained by coming to this court.

It seems plain that the course of justice must stop if such a right exists. No man will dare to consult a professional adviser with a view to his defence, or to the enforcement of his rights. The very case which he lays before his counsel, to advise upon the evidence, may, and often does, contain the whole of his evidence, and may be, and frequently is, the brief with which that or some other counsel is furnished to conduct his cause. The principle contended for, that inspection of cases, though not of the opinions, may always be obtained as of right, would produce this effect, and neither more nor less: that a party would go into Court and try the cause, and there would be the original of his brief in his own counsel's bag, and a copy of it in the bag of his adversary's counsel; nay, as often as a party found himself unprepared, or suspected that something new had come to his adversary's knowledge, he might (at least if he were plaintiff) postpone the trial, and obtain a discovery of those new circumstances, which in all likelihood had been laid before counsel for advice. If it be said that this Court compels the disclosure of whatever a party has at any time said respecting his case; nay, even wrings his conscience to disclose his belief, the answer is, that admissions not made, or thoughts not communicated to profes-

sional advisers, are not essential to the security of men's rights in courts of justice. Proceedings for this purpose can be conducted in full perfection, without the party informing any one of his case except his legal advisers ; but without such communication to professional men, no person can safely come into a Court, either to obtain redress or to defend himself against a claim.

Yet, violent as such compulsory disclosure may be deemed, and wholly inconsistent with the possibility of safely transacting judicial affairs, if the authorities are in its favour, we must submit. *Radcliffe v. Fursman*, 2 Bro. P. C. 514, is the case commonly relied on in these questions. It is a decision of Lord King's, affirmed in the House of Lords. If it had decided the question, there would have been no alternative but submission. The report in *Brown* is imperfect, and in one respect not correct ; for it conveys an inaccurate notion of the nature of the demurrer. But even by the report, and certainly by the printed cases which I have examined, together with my noble and learned predecessor, it appears plain that the record did not show any suit to have been instituted, or even threatened, at the time the case was stated for the opinion of counsel ; and the decision being upon the demurrer, the Court had no right to know any thing which the record did not disclose. All the Court knew was, that a case had been laid before counsel at some time in order to satisfy the party consulting, whether or not his rights had been affected by a certain lapse of time. And the

ground on which the production was resisted appears to have been the mischief of disclosing statements confidentially made for the private ease and satisfaction of parties. So far this decision rules that a case laid before counsel is not protected; that it must be disclosed. But the decision does not rule that disclosure must be made of a case laid before counsel, in reference to, or in contemplation of, or during the pendency of a suit or action, to serve the purposes of which action the production is sought.

The case of *Preston v. Carr*, 1 Yo. & Jer. 175, would seem to have carried the doctrine of *Radcliffe v. Fursman* this one most material step farther, but apparently without intending to do so, for one of the learned judges says, that he agrees with those who have expressed an opinion that it should not be carried further. There is, however, a decision of this Court since *Preston v. Carr*, by which I am disposed to be guided, in deference as well to all the principles upon which it proceeds, as to the authority of the noble and learned judge who pronounced it—I mean the case of *Hughes v. Biddulph*, 4 Russ. 190. I can, however, see no difference between the letters there excepted from the order to produce documents, and the cases laid before counsel. They were letters which passed between the client and the solicitor, and between two solicitors employed by the client *in the progress of the cause, or with reference to the cause before* it was instituted. *This* was the line which Lord Lyndhurst drew: and I can see no difference between the state-

ments of a case in such correspondence, and the statements which are laid before counsel in the form of a case for their opinion. Something which occurred in the correspondence might happen to be kept out of the case so laid before counsel, and that might be a motive in one instance for not refusing the production of the case, while the party might have a reason for refusing the letters. But that is accidental and cannot affect the principle; for it is clear that the case may, and in such circumstances probably will, contain as much matter as the letters, which the client cannot safely disclose; and it may very well happen that the case prepared by the solicitor should contain more than the letters. *Vent v. Pacey*, 4 Russ. 193, which followed two years after, though reported next in the same volume, is said to throw a doubt upon *Hughes v. Biddulph*, at least as far as regards its application to this question. In the first place, however, the Vice-Chancellor having acted on *Hughes v. Biddulph*, as regards the letters, his order was appealed from and affirmed. But next it is said, that a case laid before counsel appears incidentally to have been produced. The observation which I have made will explain that; for the party may not have resisted the production, on the accidental ground which I have referred to, of the letters happening to contain what he was reluctant to disclose, though the case did not. But be that as it may, there was no contest on the production of the case, and the question was not decided.

I am therefore, upon the whole, of opinion, that cases laid before counsel in the progress of a cause, and prepared in contemplation of, and with reference to an action or suit, cannot be ordered to be produced for the purposes of that action or suit.

OLDHAM v. EBORAL.

THE facts in this case are fully stated in the judgment. It is the last of a series of cases arising out of the same complicated transactions. Of these *Freeman v. Fairlie*, reported in *Merivale*, is the earliest.

LORD CHANCELLOR.—Mr. Oldham, the first husband of Mrs. Haigh, was the owner of two houses and some lands at Calcutta. On his death intestate she took possession of them, and some time after she died, having bequeathed her property to Mrs. Freeman and other relations, and leaving several executors, of whom Mr. Fairlie was the only one that acted.

Both Mr. Oldham and Mrs. Haigh died in India. Twenty-one years after the death of the latter, in 1812, Mrs. Freeman and the other legatees filed their bill against Fairlie, who had taken possession of the houses and other effects of Mrs. Haigh, for an account. In 1813 an account was decreed against Fairlie, when he stated upon interrogatory that the personal estate of Mrs. Haigh, and the rents of the aforesaid houses and land, mixed together, were carried to the account of “Hannah Haigh’s estate.”

March 2, 1833.

Right of persons established as heirs at law to obtain by bill, in the nature of a supplemental bill, the benefit of proceedings in a suit to which other persons, erroneously supposed to be clothed with that character, had been parties.

The investigation in the Master's office having cast considerable doubt upon Mrs. Haigh's title to the said houses and lands, the Court deemed it expedient to ascertain how they had passed to her from Mr. Oldham ; and accordingly, in 1814, an order was made by consent on Mr. Fairlie, to pay 25,816/., the produce of the property, into Court, on Mrs. Freeman filing a supplemental bill, to make such persons as Mr. Fairlie should name, as the heirs at law of Mr. Oldham, parties ; and, in October of that year, such a bill was filed against the Attorney-General and the East India Company, stating that the plaintiffs had been unable to ascertain who was the heir at law of Mr. Oldham, and charging the houses and land to be the personal property of Mrs. Haigh, and to pass to the plaintiffs under her will. On the 20th of November, 1815, it was referred to the Master to inquire into the tenure of the houses and land at Calcutta ; and in case he should be of opinion that the same were freehold, or in the nature of freehold estate, then he was directed to inquire and state who was the heir at law of the said Samuel Oldham.

It is under this reference that the title of the conflicting parties arises. The subsequent proceedings in the cause were no longer between Freeman and Fairlie, the legatees and the executor, but between the personal representatives of Mrs. Haigh and the heirs at law of Mr. Oldham, the latter shifting and changing as the Court cloathed them with that character, or stripped them of it ; these changes being wholly inde-

pendent of the question between the estates of Mr. Oldham and Mrs. Haigh, which both continued adequately represented in relation to each other, and equally recognized by the Court in their respective predicaments.

In July 1818, no person having yet been reported by the Master to be the heir at law of Samuel Oldham, a commission was directed to examine witnesses in India, as to the tenure of the property in dispute. The commission was returned executed in 1821. In December of that year, Elizabeth Oldham and William Smith, and Charlotte his wife, carried their claim before the Master, as the heirs at law of Oldham. The Master reported, that evidence having been given of the birth of their ancestor, (a grandfather,) Thomas Oldham, sen., before the marriage of his parents, such claim was not made out, and he was unable to ascertain who was the heir at law of Oldham. The claimants then petitioned for an issue, which was tried at Warwick, on the 30th July 1823, and found in their favour; the claimants being plaintiffs, and the Attorney-General defendant in such issue. The Attorney-General obtained an order for a new trial, when the jury found (against Oldham and Smith) for the Crown.

On the 26th November 1824, the Master, by his separate report, found the houses, &c. in India to be freehold of inheritance. Freeman took twenty-five exceptions to it.

In June 1825, Eboral was admitted by order to go before the Master with his claim, as heir at law of Oldham, *ex parte materna*; and, in 1826,

the Master reports him to be such heir, and that there are no heirs ex parte paterna; which report was subsequently confirmed.

In 1826, Mrs. Freeman and the other plaintiffs filed their supplemental bill against Eboral, as heir at law of Oldham; and, on the 21st July 1826, there was a decree, giving them the benefit of all the former proceedings, as if Eboral had been originally a party, and dismissing the bill against the Attorney-General and the East India Company.

On the 17th November 1828, the exceptions that had been taken by the plaintiffs to the Master's report came on before Lord Lyndhurst, and it being agreed that the whole should be decided on one exception which raised the main question of the tenure, his Lordship overruled that exception, and decreed the property in India to be freehold of inheritance, and that possession thereof should be given to Eboral. This is the decree in *Freeman v. Fairlie*, now under appeal.

On the 9th February 1829, Mrs. Oldham and the Smiths presented their petition in *all the above suits*, stating further evidence of the marriage of their great grandfather, the absence of which had given the verdict to the crown in the last trial; and it was thereupon ordered, on the 7th March 1829, that there should be a new trial, Oldham and Smiths being plaintiffs, and Eboral defendant. The trial took place in July, and the jury found for the plaintiffs. Eboral then made a motion before Lord Lyndhurst for a new trial, which was refused; and permission was after-

wards given to Oldham and the Smiths to file such a bill as they might be advised.

Oldham and the Smiths accordingly, on the 24th December 1829, filed the present bill against Eboral and all the other parties on the record in the former suit, praying that they may have the benefit of the proceedings in the former suit, and that the same may be reversed so far as the title of Eboral is thereby set up in opposition to them in their character of heirs at law.

This is the sole object of the suit; and if we look no further than the principle, there appears strong ground for granting the plaintiffs the relief they seek. The rights of the persons intitled to the real property, have always been represented in these suits in the contest with the representatives of Mrs. Haigh, first by the Attorney-General, and afterwards by Eboral; and the object of the present bill is to substitute the plaintiffs for Eboral, who was originally substituted for the Attorney-General. No new question arises, and no change has taken place affecting the interests of Mrs. Haigh's representatives, who had an opportunity, as against the persons representing the real property, to contest the claim upon every point, and in every stage of the inquiry. Mrs. Haigh's representatives, therefore, can only maintain the objection which they now make, on the ground of the want of mutuality. But the plaintiffs made their claim originally by petition in all the suits then depending. They failed upon the evidence. They afterwards presented another petition in all these suits, and an

order was made for the trial of an issue, upon which their title as heirs at law was proved, and upon which proceeding the present bill is founded. They cannot, therefore, on their side, object to the proceedings in the causes in which their petitions were presented, except as to the points to which those petitions apply, and which relate only to the title as between them and Eboral. They stand, as far as the representatives of Mrs. Haigh are concerned in this respect, *substantially* in the same situation as if they had been parties on the record. The mutuality, therefore, is complete, the supposed want of which was one of the principal points urged on the argument on the Commission to India.

The real difficulty in this case is created by the authorities. Lord Redesdale appears to be of opinion that bills in the nature of supplemental bills, do not let in the evidence in former suits; and he takes the distinction between them and bills in the nature of bills of revivor. We learn, however, on the authority of Lord R. himself, as mentioned by Lord Eldon, *Lloyd v. Johnes*, 9 Ves. 54, that there is obscurity in the passage, and, he seems to intimate, in the subject also, which it is not easy to remove. Lord Eldon, in that case at least, would clearly not admit it as a general proposition, and his reasoning goes to make it the exception rather than the rule; indeed his decision there, after he has discussed the point, is inconsistent with it; for he allowed a tenant in tail claiming upon the death of a former tenant in tail without issue not through or under him, but

by a new limitation in remainder, to have the benefit, by a supplemental bill, of a suit instituted by the former tenant in tail. On the other hand, in *Tonkin v. Lethbridge*, Coop. 44, he declared that to entitle a plaintiff by a supplemental bill to the benefit of former proceedings, it must be in the *same title*, in the *same person*, as stated in the original bill. Accordingly, where the supposed heir at law of the mortgagor filed a bill of redemption, and it being afterwards ascertained that he was not the heir, he filed his supplemental bill, stating his purchase of the interest of the real heir, and claimed to have the benefit of the original suit: this was demurred to, and the demurrer was allowed. Nine years after came the case of *Rylands v. Latouche*, 2 Bligh, 586, where Lord Eldon, though present, took no part in the judgment: and indeed judgment appears not to have been given by the House at all, the suit having abated after Lord Redesdale had delivered his observations, which he concluded by reading the draught-minute of an order that might be pronounced. There a devisee under a will revived a suit instituted by the deviser; and another will being subsequently established in favour of another party, he filed a supplemental bill, stating his purchase from that party, and claiming the benefit of the former proceedings. Lord Redesdale held it irregular, and not unreasonably: for in this instance, as well as in the last cited, the title set up by the plaintiff in the original bill, was wholly at variance with his title in the supplemental bill, and the

latter had been acquired during the pendency of the suit, not by operation of law, but by his own act without the privity of the defendant, and perhaps to his prejudice; for he might suffer by the transfer of the interest, and having a different party to oppose.

Besides, it would introduce a strange incongruity into pleadings if the identity of the title of the parties on the record was not to be strictly preserved. In the case now before the Court, the title of the plaintiffs is the same as the Court has dealt with in all the suits, for it was suspended rather than extinguished by the Master's report in favour of Eboral, the latter claiming under a secondary title only; and nothing has occurred in any stage of the different suits to exclude the plaintiffs, if they substantiate the pretensions which they laid before the Master under the reference of November, 1815. The introduction of Eboral into the suit, by the supplemental bill, was the act of Mrs. Haigh's representatives, and in no way disturbed the continuity of the title of the plaintiffs. As I have before observed, it merely effected the substitution of Eboral's name for those of the Attorney-General, and the East India Company, for the accommodation of Mrs. H.'s representatives—the adverse proceedings were not interrupted, and the mutuality of the titles was unbroken. The only proceedings that followed, which it can be for the benefit of the plaintiffs to perpetuate, all originate in the reference in the former suit, which was antecedent to Eboral's claim; and there is nothing in them,

as there was in *Tonkin v. Lethbridge* and *Rylands v. Latouche*, which can be deemed exclusively appropriate to his title or person. It would therefore be wrong to give a rigorous interpretation of Lord Redesdale's dictum in his Treatise, unsupported as it is even by his own authority as a judge, and explained as it has been by Lord Eldon, after his communication with him.

His Lordship stated afterwards, that he had conferred with Lord Lyndhurst, before whom this case had been in various stages, and that the judgment now given was the result of their joint consideration of the question.

SHERRATT v. SHERRATT.

THIS case came on upon appeal from a decree of the Master of the Rolls, upon the construction of a will, of which the following particulars contain every thing necessary for a full understanding of the judgment. Immediately after some specific devises and bequests to the testator's wife and others, came this clause—"I devise and bequeath unto R. S. and T. C., their heirs, executors, administrators and assigns, all and every my freehold and other real estate, whatsoever and wheresoever, as well in possession as in reversion, remainder or expectancy, except what I have hereinbefore given and devised to my wife for her life; as also all and every my leasehold estates, hereditaments and premises, as well for lives as years, to hold the said premises with the appurtenances unto and to the use of them the said R. S. and T. C., their heirs, executors, administrators and assigns, upon the several trusts hereinafter mentioned concerning such my said freehold and leasehold estates: And from and after payment of my just debts, funeral and testamentary expenses, and of the several specific legacies hereinafter given and bequeathed, and subject thereto, I give and bequeath unto the said R. S. and T. C., and their executors and administrators, all and every

my sum and sums of money, book debts, and securities for money, stock, and money in the public funds, and all other my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever the same shall or may be or consist of at the time of my decease, except such of my personal estate as is hereinbefore otherwise disposed of, upon the several trusts hereinafter mentioned and declared of and concerning such my personal estate." The testator then, having bequeathed certain pecuniary legacies, declared that his said last-mentioned personal estate was given and bequeathed upon trust that his trustees should make sale and disposal of all such his personal estate as should in its nature be saleable, and should call in such monies as he should have out at interest, and convert the whole of his said personal estate into money; and out of the monies arising from such sale, and also his monies out at interest and his ready money, should invest and place out five sums of 2500*l.*, 2500*l.*, 1800*l.*, 300*l.*, and 300*l.*, for the benefit of his five daughters. The will then proceeded—"And upon this further trust, that my said trustees, and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, shall stand and be possessed of my aforesaid freehold and leasehold estates for lives, and also the whole of my personal estate, arising from the sale of part thereof as aforesaid, ready money, book debts, and securities for money, and of the rents, issues, and profits of such my freehold, leasehold, and personal estate, until such sale or sales shall be had and made of my said personal estate as aforesaid, after payment and discharge of my just debts, burial and other expenses, and the several specific legacies hereby given and bequeathed, and the five several sums of 2500*l.*, 2500*l.*, 1800*l.*, 300*l.* and 300*l.* hereinbefore directed to be placed out at interest for the benefit of my daughters, out of my personal estate as aforesaid, upon trust that they my said trustees, &c.; and upon my son S. S. attaining the age of 22 years, I give, devise, and bequeath to him all my said freehold, leasehold, and personal estates, monies and effects, to hold the same according to the nature and tenor thereof, unto and to the use of the said S. S., his heirs, executors, administrators and assigns for ever."

For the appellants, Mr. Pepys and Mr. Cooper.

For the respondents, Sir E. Sugden and Mr. Jacob.

LORD CHANCELLOR.—The questions here arise upon the construction of a will; and they are—First, Whether or not the testator charged certain legacies upon his real estate; and, secondly, whether or not his leasehold for years, or only his leasehold for lives, passed by the residuary gift in the will.

1. We may first of all observe, that there are here no general dispositive or directory expressions, which often, in the introductory part of a will, indicate an intent to dispose of the whole estate, and, being connected with the particular gifts, throw these upon the whole estate, though not expressly charged; as, “I give and devise all my worldly estate as follows,” or “in manner following,” or “I will that all my debts and legacies be first paid and satisfied.” Such introductory matter is found in many cases, as *Aubrey v. Middleton*, 2 Eq. Ca. Ab. 497, decided by Lord Cowper, and *Trott v. Vernon*, 2 Vern. 708, and *Alcock v. Sparhawk*, Ibid. 228. Even such words, “As to all my worldly estate as follows,” when joined with “after my debts and legacies paid,” were got over by Lord Macclesfield in *Davis v. Gardner*, 2 P. Will. 190, on account of other parts of the will, inconsistent with the intent to charge, and indicating the contemplation of a surplus of personalty. Next, we may remark that there is no blending together of the different kinds of property in one mass, and dealing with it all in the same way. On the contrary, the freehold and leasehold is kept studiously distinct from the personalty, or rather from the rest of the estate, in a manner so

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The words “from and after payment of my just debts, funeral and testamentary expenses, and of the several specific legacies hereby given and bequeathed,” occurring in connexion with a devise of real estates, held, regard being had to the whole frame of the will, to create no charge of the legacies upon the realty.

Leasehold for years, being mentioned in former part of will, held to pass by the residuary devise in which, although the word “leasehold” occurred, yet unless extended beyond the last antecedent, it could have comprised only the leaseholds for lives.

Reflections upon the consequences of the judge endeavouring to supply the defects of the legislator.

The Romilly act for rendering freehold and copyhold estates assets for the payment of simple contract debts.

marked as leads us far towards the decision of the question.

After giving an estate for life in certain tenements to the wife, who pre-deceased him, he devises and bequeaths "all my freehold and other real estate whatsoever" (except that devised before to his wife for life); "as also all my leasehold estates, as well for lives as years, upon the several trusts hereinafter mentioned, concerning such my said freehold and leasehold estates." Nothing can be more distinct than this repetition of reference to the real property, including all that savours of realty, which closes as it had begun the gift. He then goes on to deal with his other property, and begins with words of charge, at least of implied charge, which are nowhere to be found in the first gift, those words of charge being here applied to the debts, funeral expenses, and specific legacies, which are afterwards, in the declaration of the trusts, repeated in connexion with the personal fund (or, according to the other view, with the whole funds), though that fund is the residue, after payment of those very debts, expenses, and specific legacies; "and from and after"—(which absurd mode of expression might possibly raise a doubt whether "after" was an adverb of time, only that this is immaterial as regards this fund; we must, however, read it as "after")—payment of my debts, funeral and testamentary expenses, and of the several specific legacies hereinafter given and subject thereto; I give and bequeath all sums, book debts, securities, stock, money, and all other my personal estate and effects whatsoever, except

such of my personal estate as is hereinbefore otherwise disposed of, upon the trusts hereinafter mentioned and declared of and concerning such my personal estate ;” closing with a second reference to the personal estate (not before given)—the subject of this second gift—as he had before closed the first gift, with another reference to the subject of that first. Now, on this branch of the will no doubt can arise as to the leasehold for years being included in the words “personal estate”—for the leaseholds for years are specified under the first head, and therefore under the second he only takes in the personalty, exclusive of terms of years. It is further to be remarked, that this part of the will is evidently more accurately penned than the rest, with the exception of the improper use of the word “specific:” thus, in the first branch he gives to the trustees, their heirs, &c., when he is dealing with real property, as well as terms ; and in the second, when he is dealing with personalty, he leaves out “heirs.”

This gift then is the foundation of the will, and it is most important, as showing the design and plan of the whole arrangement. It carefully keeps the two branches of the testator’s property separate, classing the whole under two heads ; the first, his freehold and leasehold of whatever kind, whether for lives or years ; the second, all his money, stock, and other personal property whatever ; and it refers severally to the trusts to be afterwards declared separately, with respect to these two branches or divisions of his property. Surely, if we may resort to introduc-

tory expressions, operating upon the whole estate, or blending the different funds together in one mass, as evidence of intention to charge the real estate, we cannot avoid regarding this careful distinction and severance of those funds, coupled with the words of charge introduced into the clause touching the one and not into that touching the other, as a strong indication of the design not to throw the legacies upon the land. Of course no proof of such a negative would be required, were there no words in the other parts of the instrument tending to show an intention to charge, or, at least, raising some doubt whether such an intention was not entertained.

Let us now see therefore to what those words amount, and in what way the trusts referred to in the former part are afterwards declared.

He begins this latter part by still keeping the two funds distinct; first mentioning the freehold and leasehold (here called "for lives"), next saying, "and also the whole of my personal estate arising from the sale of part thereof," &c. &c.; and then comes an enumeration, differing from that in the former part, of the items of which the personal estate consists, but with no words comprising the whole personalty; and then the words immediately follow which form the principal argument in favour of the charge, "after payment and discharge of my just debts, burial and other expenses, and specific legacies, and the five sums," &c. But when he has enumerated the legacies and sums so said to be charged, he closes the whole with these words. "out of my personal estate as aforesaid:" so that, if

it is to be read, "after payment, out of my personal estate as aforesaid, of my debts and legacies," there is an end of the question; for even if there had been a general introductory direction to pay debts and legacies, this subsequent part of the will, referring the payment to the personal estate, would seem to remove all doubt, being, as it were, an appropriation of a particular fund, according to the principle recognized in *Thomas v. Brittnell*, 2 Ves. sen. 113. It may be said, however, that the words, "out of my personal estate as aforesaid," must be referred to the last antecedent only; that is, "the five sums directed to be placed out at interest for the benefit of my daughters," &c. But it must be remembered, first, that the bulk of the argument in favour of the charge, turns upon extending the words "after payment" beyond the last antecedent, viz., the personalty, to the realty previously mentioned; and, secondly, that although we restrict the words, "out of my personal estate," to the direction touching the five sums, the repetition of the reference to personal estate only shows more strongly that this was the fund to which he always looked for providing these sums. He does not say, after making good any deficiency in the funds, already set apart for supplying these sums or making those investments; but assuming that he had already directed his personalty to be in part bestowed in those investments, he is now disposing of what remains of that personalty, after making the investments. So that, in either way of reading the closing words, "out of my personal estate," the inference that it was his intention to

charge the legacies on the personalty alone, drawn from the separate gift of the two funds, is strengthened,—certainly not at all impaired.

I think, then, there can be little hesitation in arriving at the conclusion that the real estate, at least the freehold and leasehold for lives, is not charged. But I do not so much rely, in support of this inference, upon the words “after payment,” &c. being separated from the reference to the realty by the mention of the personalty, because those words may be connected with the former without doing any great violence to the construction. It is from the other parts of the instrument,—from the distinct statement of the two branches of the property in the gift; from the words which close the part last commented on; and from the probable general intent to be gathered from the whole frame of the will, that I consider it plain that he used those words “after payment,” &c. solely with reference to the personal estate.

2. I have much greater doubt upon the second question, because the different parts of the will are not consistent with one another in their manner of referring to the leasehold for lives and years. The first, and what, in my view, must be the governing part where the rest is of doubtful import, separates the property into two branches; and, in one of these, comprehends expressly both kinds of leasehold. The latter part in which the trusts are declared makes another division, the first branch being freehold and leasehold for lives; the second being an enumeration of particulars all of

personalty, but without any words which designate the whole personalty ; so that the leasehold for years is not in this part of the will directly, or indeed at all, included. In what follows, it is true, the mention of "rents and profits," in connexion with "said personal estate," may seem to indicate that the testator had before referred to leasehold for years, especially as he uses the same words in relation to the income from the freehold and leasehold for lives. But when we observe how inaccurately some words are used throughout the will, as "specific legacies hereinafter bequeathed," when nothing like a specific legacy is thereafter bequeathed, and when therefore it is clear he means the legacies not specific, but pecuniary or general, unless you were to read "hereinafter" "hereinbefore," beside other inaccuracies of a like kind, we cannot safely place any reliance on the use of the words "rents and profits," and hold that it shows he had immediately before intended to speak of such personal estate as yielded rents. Then, in this part of the will, the word "said" is always prefixed to personal estate, and confines that expression to an enumeration of particulars whereof leasehold for years does not make one.

The difficulty arises from the mention of leaseholds for lives twice in this part of the will. If the latter part had given any clear indication of an intention that those leaseholds, with the freehold, should go a different way from the leaseholds for years, it would have been impossible to avoid allowing the preceding division into two branches, and the inference thence arising, to be

controlled by the intention indicated in the latter part. But no such clear indication is to be perceived ; and the last gift is of “ all my said freehold, leasehold, and personal estates, monies and effects.” Now though this word “ said ” might here, without the earlier parts of the instrument, have confined the leasehold and personal estate to the last antecedent, yet, coupled with those parts, I consider it sufficient to show an intent that the leasehold for years should pass, and not be excepted. I think he intended to dispose of all.

The course of decisions upon questions coming under the general class to which the present belongs, suggests some of those reflections, which I have more than once had occasion to make, upon the consequences of the judge endeavouring to supply the defects of the legislator. The law having said that a man may die and leave his real estates to his heir or devisee, without paying his simple contract debts, although possibly those debts were contracted for the purchase of those very estates, the Courts have naturally felt a strong inclination to discover in each will an intention to do what every honest testator ought to do—viz. avoid taking advantage of the defect in the law, and charge his real estates with his debts. In pursuing this course, dictated by feelings of the most natural justice, it cannot be denied that many subtleties have been resorted to, and much violence used towards the language of wills ; insomuch that Lord Loughborough seems to have thought the cases would almost have authorized you to say that the bare mention of

debts in any part of a will devising real estate subjected it to them. *Williams v. Chitty*, 3 Ves. 545. But then came the difficulty, how legacies were to be treated when found, as they generally are, in the same clause of direction, or implied direction, with debts; since the ratio suasoria, which moved the Courts to strain the words so as to charge the debts, did not at all apply to legacies. Accordingly a struggle was made by a most able and excellent judge, Lord Alvanley, (*Kightly v. Kightly*, 2 Ves. jun. 328,) to draw this distinction, and hold that the same words which charged debts need not of necessity charge legacies also; a distinction long before adverted to, if not actually taken as the ground of decision, by Lord Macclesfield, in *Davis v. Gardner*. It should seem, however, that this part of *Kightly v. Kightly* has not met with the approval either of the Courts or the profession. Lord Loughborough denied it soon after in *Williams v. Chitty*; and the difficulty of giving two different meanings to the same words, in the same part, of one instrument, is hardly to be got over. On the one hand, nothing can more strictly mark the inconvenience of the law being left in such a state as to drive those who administer it into these perplexities, and leave them only the choice of suffering injustice, where there may be some doubt whether or not the law compels them; or of altering the law and inventing arbitrary distinctions to preserve consistency of principle; or of changing the law by stretching it, and then introducing incongruities which the legislature

could easily avoid. Yet the remark on the other hand is equally obvious, that the interposition of the Courts, in any way, to mitigate the evils of the law, is attended with great inconvenience. It not only gives a fluctuating and varying, and therefore an uncertain, rule of conduct to the subject, one of the greatest evils that can be endured, and to which any fixed and known rule, though vicious in itself, is preferable ; but it prevents, effectually prevents, the amendment of the law. No one can doubt that had the rigour of the rule against simple contract creditors been left unrelaxed, the lawgiver, whose exclusive province it is to apply the remedy, would, from the pressure of the evil, have removed it long ago (*a*).

(*a*) The salutary change in the law here adverted to, and which had first been pressed upon parliament 26 years before by Sir S. Romilly, was at length effected, a few months after the date of this judgment :—an act being then passed, introduced by Mr. J. Romilly, for subjecting all real estates to the payment of simple contract debts, so that men can no longer, in the words of some of the cases, “ sin in their graves.”

SCOTT v. SALMOND.

THIS came on by appeal petition against an order made at the Rolls upon a petition and cross-petition presented in a suit to establish the trusts of Sir James Sibbald's will.—That will bequeathed life annuities to various persons, amounting to the sum of 1468*l.* a year. Among these was one of 753*l.* to Ann Dawson, and another of 350*l.* to trustees, “ for and during the lives of Margaret Mills, Mary Mills, and J. E. Mills, and the lives and life of the survivors

and survivor of them, upon trust to pay such annual sum to them the said Margaret Mills, Mary Mills, and J. E. Mills during their joint lives, and upon the death of one of them to the survivors of them during their lives, and upon the death of two of them to the survivor during his or her life." The will then devised the testator's undivided moiety of his Spitalfields estate, which moiety, as was recited, then produced a rent of 985*l.* a year, unto J. Forbes, E. Ravenscroft, J. H. Stracey, and J. Edison, their heirs, executors, administrators, and assigns, upon trust to apply the rents and profits thereof towards payment of the said several annuities; "and when, by decease of some of the said annuitants, there shall be a surplus of such rents and profits after payment of the annuities for the time being in existence and payable out of the said rents, upon trust to pay and apply such surplus rents and profits to such person or persons as David Scott shall from time to time appoint by note in writing to receive the same;" and there were limitations in default of appointment, in favour of the wife and children of the said David, now Sir David, Scott. The will then continued—"And as it will be necessary for my executors hereinafter named, to set apart some proportion of my personal estate for payment of such part of my said annuities as the rents of my moiety of the Spitalfields estate will not be sufficient to pay, now I do hereby give such monies as shall be necessary to be set apart for such purpose, unto the said J. Forbes, E. Ravenscroft, J. H. Stracey, and J. Edison, their executors, administrators, and assigns, upon trust that they and the survivors or survivor of them, do and shall lay out and invest the same in the purchase of 3 per cent. Bank annuities, or at interest upon government or real securities, and do and shall pay, apply and dispose of the interest, dividends, and annual produce of the said monies and securities, in and towards the payment of such of the said annuities, or such part or parts of the same annuities respectively, as the rents and profits of the said moiety of the said estate shall not satisfy and discharge; and as to such monies and securities, and the interest and dividends thereof—subject to the trusts lastly hereinbefore expressed for making good, by the interest and dividends thereof, any deficiency, from time to time to arise in the said rents and profits, to make payment of all the said annuities for the time being in existence and payable,—upon trust, as and when the said annuities

shall fall in or expire, to assign and transfer the said monies or securities unto J. Salmond, R. Scott, and Captain Scott, their executors, administrators, and assigns," upon trust as the said D. Scott should appoint: and, in default of appointment, there followed limitations for the benefit of his wife and children.

After deducting receiver's poundage there was a deficiency of the net rent of the Spitalfields estate for the satisfaction of the annuities amounting to 556*l.* 7*s.* 6*d.* This deficiency the personal estate was wholly inadequate to supply. It was 764*l.* 12*s.* 9*d.* only. An abatement of the annuities consequently took place, and Mrs. Dawson received in respect of her annuity 467*l.* 11*s.* 10*d.* out of the rents of the real estate, and 14*l.* 4*s.* 6*d.* out of the income of the personalty. She died in December 1831, and the petitioners were the surviving annuitants, who claimed to have the 467*l.* 11*s.* 10*d.* and the 14*l.* 4*s.* 6*d.*, both set free by her decease, applied in payment of their growing deficiencies and of the arrears accrued during her life on their respective annuities. The cross-petition of Sir D. Scott, and his wife and children, claimed these sums as theirs.

His Honor dismissed the petition of the surviving annuitants, and allowed the prayer of the cross-petition.

The case on the appeal was argued by Mr. Knight, Mr. Jacob, and Mr. Evans, for the appellants: Sir E. Sugden and Mr. Wigram for the respondents.

April 15, 1833.

Annuities given, and funds appropriated for the payment, but which proved insufficient for the purpose. One of the annuitants dying, it was held that the yearly sum she had received in respect of her annuity was not applicable to make up the deficiency in the other annuities, but went to parties entitled in remainder.

LORD CHANCELLOR.—The testator having here bequeathed certain annuities, and then appropriated certain funds, out of which they were to be paid, and those funds proving deficient, the question is—whether the annuity (or rather proportion of annuity) of Ann Dawson, who has died, shall go to make up the deficiency in the remaining annuities, or shall go to the devisee over of the fund? And I agree with the Master of the Rolls in thinking, that no intention is shown to give the survivors the benefit of such augmentation, or making up, by survivorship; nor do I

think that any such intention appears, whether we regard the general structure of the will, and the intent to be gathered from thence, or weigh the particular expressions in the different parts of the instrument, at least the greater number of these.

The testator first gives to different persons annuities to the amount of £1468. One of these annuities is to three jointly (the present petitioners), and is given by express words to the survivor, in a way plainly showing, that when it was his intention to create an accruer, he could use the most apt words for effecting this purpose. He gives it to trustees for and during the lives of the three annuitants, and lives and life of the survivors and survivor of them, upon trust, to pay such annuity to them during their joint lives, and upon the death of one of them, to the survivors of them during their lives; and upon the death of two of them, to the survivor, during his or her life. The testator then gives and devises his undivided moiety of the Spitalfields estate, of which he was tenant in common with another, and which share he notices then produced a rent of 935*l.*, to trustees upon trust, to receive and apply the rents and profits *towards* payment of the annuities before bequeathed.

It is very material to observe, therefore, that he sets out with the knowledge that there is to be a deficit in the rents of the real estate of 533*l.*, and consequently, as far as that fund was concerned, he gave each only about two-thirds of the annuity nominally bequeathed. He then

provides for the event of the discontinuance of some of the annuities, thus:—"And when, by decease of *some* of the said annuitants, there shall be a *surplus* of such rents, after payment of the annuities for the time being, in existence, and payable out of the said rents, upon trust to apply such *surplus* rents to such persons as Sir D. Scott shall appoint." These words seem to raise the only doubt; and had it been "any," or "one or more," instead of "some," I hardly think, even the word "surplus" could have raised a question, because the books show (particularly *Page v. Leapingwell*, 18 Ves. 463,) that this word, at least the equivalent word, "overplus," may receive a construction from the context, and because the words that follow, "annuities for the time being in existence," and "payable out of the said rents," independent of the other indications of meaning which they give, when coupled with what went before, as to the assumed deficit in the fund, are to be taken as expressing not the whole nominal annuities, but the proportional parts of the fund. He never provided for a case which he never contemplated—a deficit of both funds. On the contrary, in this latter part he distinctly directs each annuity to go over as it falls in.

However, what follows removes any doubt which might remain. He says, that as his executors will have to set apart a portion of the personal estate "for payment of such part of my said annuities, as the rents of my moiety of the Spitalfields estate will not be sufficient to pay," he

directs them to invest money in the funds, and apply the interest "*in and towards*," (no longer "*towards*," as before, when he knew there must be a deficiency—but "*in and towards*,") "the payment of such of the said annuities, or such part or parts of the same respectively, as the rents shall not satisfy." Here he never contemplates any deficiency at all; the personal fund is assumed quite sufficient to supply the assumed deficit of the real. Moreover, it is clear that he deals here with each annuity separately, and directs the deficit of each to be supplied, and he then directs the personalty so appropriated to be assigned and transferred to the legatees over, "*as and when* the said annuities shall fall in or expire."

The argument for the annuitants, if it proves any thing, would prove that they are entitled to the arrears from the beginning when the deficiency affected their annuities. It also would prove, that not merely the allotted portions of the rents received by the deceased annuitant should go to supply the deficit of the survivors, but that the subsidiary or supplemental fund from the personalty, should be applied in the same way, both for arrears and further payments; conclusions which, indeed, have not been repudiated, yet have been but faintly maintained. I do not believe there ever was an instance of arrears being thus made good, unless most express provision for it was found in the instrument. And as for the surplus personal fund being distributed among the remaining annuitants, it is against the distinct

direction of the will. The word “surplus” not occurring in the latter part, we may further remark, affords a strong presumption that it was used in the former part in the sense assumed by the judgment.

The order must therefore be affirmed, and the petition dismissed.

MANNERS *v.* CHARLESWORTH.

THE Vice-Chancellor had dismissed a petition for quashing the return of Commissioners of Partition, and the petitioners now appealed from his order.

Mr. Rolfe, Mr. Koe, and Mr. Kindersley, for the appeal.
Mr. Attorney-General, Sir E. Sugden, Mr. Knight, and Mr. Wakefield, in support of His Honor's order.

April 23, 1833.

Jurisdiction and practice of the Court with reference to proceedings under Commissions of Partition.

Largeness of the discretion vested in the Commissioners.

LORD CHANCELLOR.—A considerable obscurity hangs over many parts of this subject of Commissions of Partition, both as to the origin of the jurisdiction, after the statute of Hen. 8, and as to the principles which govern its exercise. Lord Eldon appears to have felt this in *Watson v. Duke of Northumberland*, 11 Ves. 153. There is no trace of it, I believe, in this Court before 40 Eliz., and it was of rare and uncertain use as late as the beginning of Car. I.; yet our oldest books fully recognize the proceedings at common law, in the analogous writ of partition which we find in *Fleta*, (lib. 5, c. 9.) by the most plain indications that similar actions of the Roman law were anciently

recognized in our jurisprudence (a). That the mode of proceeding by the commission is far from being accurately defined in practice, appears by Lord Redesdale's opinions in *Curzon v. Lyster*, which Mr. Seton has published in his late work (*Forms of Decrees*, 191.) and that the practice as to the important matter of their return has at times been extremely loose, we may gather from the fact, that as late as 1805, at least, the return was in general made without the evidence, contrary to the exigency of the commission in one of its most important particulars. This appears from what passed in the case I have referred to, of *Watson v. Duke of Northumberland*.

Some things, however, appear to be settled, or at least they are so assumed in the books, and in Lord Redesdale's observations upon the subject. The Court will be slow to interfere after a partition made; and upon mere evidence of inequality I can find no instance of interference where the regularity of the proceedings was not impeached. In one case indeed (*Turner v. Morgan*, 8 Ves. 143, and also 11 Ves. 157 n. and 17 Ves. 546 n.) where a house was to be divided, and the whole chimneys and fire-places and the only staircase were allotted to one, the exception taken was overruled; the Court holding apparently that the parties must thus be compelled to buy and

(a) The chapter in Fleta on mixt actions enumerates as known in our law, those termed by the old civil law *familie erciscundæ*, *de communi dividundo*, and *finium regundorum*, which are all treated of exactly on the same footing with the writ of partition.

sell. Again, the commissioners, though they are to act equally between the parties, and are, when named, the commissioners of all, and not of those who chuse them, are nevertheless chosen by these parties severally, which clothes their proceeding with somewhat of the nature of an arbitration; and makes their award less liable to be disturbed than the judgment of persons in whose selection the parties had either none of them interfered or only one of them. In the present case, three of the four were, I think, chosen by the objecting parties. It may further be observed, that they are not bound to pursue the course of examination pointed out by the parties, nor even to put the questions these may desire. Lord Redesdale holds, that they may frame interrogatories which they think more proper for obtaining information, and substitute them for the interrogatories proposed by the parties; and he adds, that for the discretion which in other cases is attributed to counsel, there is in this case substituted the discretion vested in the commissioners. Lastly, we may observe from the exigency of the commission, and the tenor of the return, how much depends upon the commissioners themselves, and how much the Court looks to them in the capacity of witnesses as well as arbitrators. They “are to go to, enter upon, walk over, and survey the estate in question, and according to the best of their skill, knowledge, and judgment, make a fair partition.” Not to determine upon inquiry, and according to the evidence; but to see and judge for themselves, by their own

skill and knowledge. This is their principal function or mode of performing their office; but to aid them in exercising it they are endowed with a supplementary power of calling for the testimony, including of course the opinions, of others. They are authorised, "for the better making such division," to summon "all such witnesses as they shall see occasion for." No Court of an ordinary kind has any right whatever to determine what evidence is wanting for its guidance; that belongs to the parties; and when their cases are closed, the Court never does more for its own satisfaction than to call back a witness whom the parties had examined, or to look again at a document which they had produced. No Court ever institutes or can institute a new inquiry, or enter on a line of evidence entirely new (*a*). Again, if witnesses are called, the commissioners are authorised to examine them "upon such interrogatories as they shall see occasion for." They have thus a larger discretion in calling for evidence beyond their own inspection, and in dealing with that evidence; a discretion, it is true, not to be exercised arbitrarily and capriciously, but soundly, yet still a discretion widely different from any possessed by ordinary Courts which are in the hands of the parties, except so far as the rules of evidence are to be applied by their superintending authority.

(*a*) The only thing which can be regarded as an exception to this position is the directing of issues and calling for additional affidavits for the better information of the Courts; but this in no material respect affects the force of the observation in marking the peculiarity of the commission.

Accordingly the commissioners are always, the greater part of them, in this case four out of five, persons of professional skill, surveyors, or land valuers; and how much store the law sets upon the view, may be seen by the care taken with respect to it. Littleton, s. 248, gives the terms of the judgment for partition between parties, quod partitio fiat, and that the sheriff in his proper person shall go to the lands, and there by the oath of twelve lawful men shall make partition; and the stat. 8 & 9 Will. 3. c. 31, (for facilitating the proceedings under the Writ of Partition,) provides for the necessary absence of the sheriff, by directing that two justices shall attend with the under-sheriff^(a).

I cannot, in applying these principles to the present question, find that the commissioners, who entered into the examination for themselves, have so conducted their inquiry as to call for the interposition of the Court.

The return is regular, with perhaps the single exception of reference being made in the depositions to documents not annexed. But that defect, if it exists, can easily be supplied by amending the return and annexing the documents. A latitude as great has been assumed by the Courts of common law, in dealing with the return to a writ of partition. In *Baker v. Daniel*, 6 Taunt. 193, the Common Pleas amended the return in a material part, to make it tally with the count, and did not think of quashing it, and ordering a new inquiry. In *Rouse v. Barker*, Bunb. 251,

(a) In *Fleta*, § 9, the writ to the sheriff enjoins "in propria personâ tuâ accedas ad talem locum."

where a material error in the date of a surrender had been committed in a return, the Court ordered the commissioners to amend it.

Where the shares of the parties are to be equal, as here, and even where they are not, by means of a little additional arrangement, I suggested, during the argument, that an obvious course to take for securing equality, was for one party to divide, and the other to choose, subject to the superintendence of the commissioners, which would still be necessary in order to prevent error from want of skill, and also fraud and collusion where there were more than two parties. Something of the same suggestion I find had occurred to Lord Redesdale, as may be seen in the answer which he gave to the seventh query of the second opinion.

But whatever may be the best way of proceeding, the question here is, whether or not the commissioners have so far deviated from the plain and just course of determination, as to require that their whole award should be set aside, and their inquiries be, not perhaps renewed *ab initio*, but opened and continued as long as the parties are disposed to maintain the examination, with this additional circumstance, that now each has some notion to whom the parcels will be given, and consequently all will be in conflict upon the very vague question of relative value.

As for all that is at first sworn of the parties and their solicitors and agents not being present at the proceedings in execution of the commission, because they were not present at the delibera-

tions of the commissioners (for it amounts to no more), there is plainly nothing in that. Then one of them is sworn to have attended on the 23d of May, 1832, and been civilly desired to withdraw; and this is said to rebut the affidavit on the part of the commissioners, that they were perfectly accessible to all the parties and their solicitors or agents. But the 23d May was the day appointed for finally determining the partition, and preparing the certificates, and abundant time had been given, and even notice of that circumstance; and the opportunity was neglected, as I shall presently state.

It is then said, and this is the main charge, that in Sept. 1831, the parties informed the commissioners that their plan and valuation were preparing, and would take six months to complete; and it is added that in February, when this period had nearly expired, they gave another notice for being ready in May with those plans and with other evidence as "to the nature and extent of the property," and that they also hoped to be then able to produce "evidence relative to some property not yet brought to the notice of the commissioners." To this, which surely the commissioners had some right to consider as trifling with them, an answer was given, that on the 12th March (six months from the September notice), there would be held a meeting at Grantham for continuing the calculations. On the 26th April a notice is given by the commissioners, that they intend to meet on the 23d May for the purpose of making the allotments and signing their return. The parties who were to have been ready before

April, or rather perhaps before March, with their plans and valuations, suffer this additional month to elapse and take no steps to come before the commissioners. Nay, they do not even come on the 23d May, but on the 30th they serve the commissioners with a circular, stating that they are at length ready, and beg them to appoint the 28th of June (a month later) for receiving evidence, and if that day will not suit them, any other day, provided it be after the 28th; and those parties then express some surprise at receiving a letter dated June 1, in reply to their circular, and intimating that it had been received while the return was engrossing, which had since been executed and deposited in the Six Clerks' office. One should have thought that the notice of the 26th April might have prepared them to expect, that if they waited till a week after the day fixed for making the return, there was a very fair chance of finding that return far advanced on its way, if not to the Six Clerks' office, at least to the stationer's.

I can see no misconduct in these commissioners, no mis-trial, nothing to justify this application for a further inquiry, and it must be refused with costs.

RATTENBURY v. FENTON.

SNOWDEN sold a ship to Cumming for a nominal consideration, and then became a bankrupt, and Rattenbury was appointed his assignee, and Cumming died, and Fenton was his executor. Rattenbury, in his character of assignee, filed a bill against Fenton to have the sale to Cumming set aside for fraud, but which bill was dismissed upon the hearing; when it appeared that the sale had taken place upon the understanding that Cumming would pay a debt owing from Snowden to Rattenbury for repairs done to the vessel. Rattenbury then filed a second bill against Fenton, praying to the effect stated in the judgment, and to which bill the decree of dismissal was pleaded in bar.

April 23, 1833.

Plea of decree dismissing a former bill overruled, on the ground that although the new bill in part prayed the same relief, yet that its main object must be taken to be different.

LORD CHANCELLOR.—The second bill sets forth the circumstances, which are alleged to charge the ship in Cumming's hands, with a trust to pay Rattenbury's debt, i. e. the sum of £661 due from Snowden to him for repairs. The letter 8th March, 1827, from Snowden to Cumming, is the principal proof of this, followed by a letter 20th March from Cumming to Smith and Snowden, the brokers of the ship: the bill of sale being executed 26th March. This sale was made by Snowden in confidence that Cumming would pay Rattenbury's debt, and the consideration (£1800) required to be stated in the bill of sale was nominal. Snowden drew a bill afterwards on Cumming for the amount of Rattenbury's debt in the latter's favour, which Cumming refused to accept. The bill, it is true,

sets forth Snowden's bankruptcy, and Rattenbury's appointment as his assignee, and after stating his (Rattenbury's) demand of payment of his debt from Cumming's representative, it adds, that he called on him to account to him, Rattenbury, as assignee of Snowden, for the surplus of the consideration (£1800), after deducting that debt. But the debt is the main part of the statement. The prayer is, that an account of the debt may be taken, and that the bill of sale and possession under it may be declared fraudulently obtained by Cumming, and that Fenton, his representative, is liable either to pay Rattenbury's debt, or to account to him as assignee for the value of the ship; and that if Cumming's representative is to have a right to any balance in respect of any claim he might have against Snowden, it should only be after payment of Rattenbury's debt. Although there is certainly a repetition (by way of alternative) of the case on behalf of Snowden's estate, that is, a case of fraud in the bill of sale, and a prayer that it may be declared fraudulent, yet the main object of the second bill is the establishment of a trust in Cumming for the amount of Rattenbury's debt as against Snowden; and Rattenbury sues, it may be observed, individually, and does not entitle himself assignee of Snowden's estate and effects.

Let us now look to the first bill. It describes him as assignee of Snowden's estate and effects, and this character may be taken as understood throughout, at least wherever it can be so read consistently with the context. Now though this

first bill certainly states the debt of Snowden to Rattenbury, it is rather as part of the statement of fraud; it is as showing that Snowden was insolvent when he executed the bill of sale; it is not the principal object of the statement; that principal object is the fraudulent execution of the instrument. As for the statement that Snowden had after the execution of the bill of sale directed Rattenbury to apply to Cumming for payment, and that he had done so, and been refused, it really amounts to nothing; at least, if it proves any thing, it is only as an additional circumstance to support the case of fraud, and certainly does not amount to any allegation of a trust in Cumming to pay the debt; for it was after the bill of sale. The statement of what passed before and at the sale, as far as I have been able to follow it, is confined to an averment of the debt due from Snowden to Rattenbury, and of Cumming being cognisant of that; and this averment is plainly made to prove the insolvency of the vendor, and fix the purchasers with notice of it; for it is thus put,—that Snowden was in and previously to March, 1827, at the time of the execution of the bill of sale, insolvent, and in particular was then unable to pay Rattenbury's said demand; and Cumming then knew Snowden to be insolvent, and in particular that he was unable to pay Rattenbury's demand.—I am assuming the copy of the pleadings to be correctly marked as to the amendments, and that the passages in the bill as marked were struck out of the amended bill. My last observation would be displaced were

the parts thus marked still in the bill. It then prays for an account of the transactions between Snowden and the creditors, of the value of the ship at the date of the sale, and payment of what still appears due to Rattenbury as assignee; and the whole prayer is manifestly on his behalf as assignee, and on behalf of the estate which in that character he represents and administers. The dropping of the words "as such assignee" in one place, plainly signifies nothing; the context showing that it is here, as throughout, quasi assignee that he prays.

I can have no doubt, therefore, that the view taken by his Honor the Vice-Chancellor was strictly correct, when he held the case made and the relief prayed by the second bill to be essentially different from the case and the relief in the first; and so the Master of the Rolls appears also to have held, when he dismissed the first bill, at least so far as regarded the setting aside the bill of sale for fraud; but found, and, as is said, lamented to find, that he could not give the other relief, to which we are told the evidence pointed, and which the frame of the bill would not comprehend.

It followed from these views (at all events the Vice-Chancellor so held, and I think justly,) that the decree in the first suit could not be pleaded in bar of the second. I might possibly have entertained some doubt whether the plaintiff had not, in a manner, brought this plea upon himself, by the alternative in his second bill, (when he repeats the case of fraud disposed of by the decree in the first). But if his Honor gave the costs

notwithstanding that, I am not disposed to disturb the order. In dismissing this appeal, however, and affirming the decree below, I give no costs here, and the deposit is to be returned.

KING v. TURNER.

A suit had been instituted to compel the performance of an agreement to purchase a copyhold estate ; which was resisted on the ground that the heir, under whose will the vendors claimed, had never been admitted. The Vice-Chancellor thought the objection valid, and this was an appeal from his decision. Subsequent to the argument before his Honor, the case of *Right v. Banks*, 3 Barn. & Adol. 664, had been determined.

Mr. Attorney-General and Mr. Parry for the appellants. Sir E. Sugden and Mr. Jacob for the respondent.

May 22, 1833.

Heir, who was never admitted, may devise copyhold descended to him.

LORD CHANCELLOR.—There is some difficulty in discovering how a question could ever have been raised upon this point, considering that the principles are clear, and the course of decisions as well as the dicta have been uniform regarding those principles. As against all the world, but the Lord, the copyhold heir has a good title without admittance ; and on this ground the Court of King's Bench used, until very lately, to go so far as to refuse a mandamus to admit him, as unnecessary : *Rex v. Rennett*, 2 Term R. 197. That he can, before admittance, surrender to a purchaser, so as he does not by it

prejudice the Lord of his fine, and that he is tenant by copy of Court Roll, his ancestors' copy belonging to him, is incontestible. It is, in fact, the third resolution in *Brown's* case, 4 Rep. 22 *b*. The distinction between heir and purchaser is plain, and it is recognized in all the cases, the law casting the possession of the ancestor upon the heir, while the purchaser has nothing before admittance. Thus, in *Wilson v. Weddell*, Yelv. 144, it is said, "The heir may surrender before admittance, and well, because in by course of law, for the custom which makes him heir to the estate, casts the possession upon him from his ancestor;" and *Alderman Dixie's* case, in 24 Eliz. is cited. But in *Doe v. Tofield*, 11 East, 246,—a case twice argued, and in which all the bearings of the subject were thoroughly considered, and fully gone into by the Court,—that distinction is throughout taken; it is reasoned upon, made the ground of decision, and used as the means of reconciling cases apparently in conflict. Thus, their Lordships say, "*Colchin v. Colchin*, as appears by Cro. Eliz. 662, was the case of an heir who surrendered before admittance, not of a surrenderee, and all the authorities agree that an heir is in before admittance and surrender." *Doe v. Tofield* itself was the case of a surrenderee having surrendered out of Court to the use of his will, and it was held void, on the express ground that the case of the surrenderee differs from that of the heir.

There is, therefore, no reason whatever for holding that any law was laid down for the first time,

or any new view taken of legal principles in *Right v. Banks*, 3 Barn. & Adol. 664, the case recently determined, after much consideration, by the Court of King's Bench. That consideration was the more careful, on account of certain dicta which are to be found both in this Court and the Courts of Law—dicta not at all affecting the principles upon which the point seems clearly to be settled—but, what is somewhat singular, affecting rather the point itself, and seeming to fling some doubt upon it; and *Smith v. Triggs*, 1 Str. 487, is the authority to which this doubt may be mainly traced. But there is in that case nothing like a decision upon the question. The Court said, that the defendant had no title in him for want of an admittance of the deviser, and also for want of a surrender to the use of her will. But the latter defect was quite sufficient before the late statute; and whether admitted or not was quite immaterial, and whether admittance was necessary or not was equally immaterial, if she had never surrendered to the use of her will. I think we may easily understand how the few words, “for want of an admittance,” on which the doubt rests, found their way into the resolution. The deviser was both devisee of her mother and her heir-at-law; and, indeed, the question in the case, and the only one determined, was, whether she took by purchase or descent; and before disposing of that question, and, therefore, before ascertaining the character in which she took, the observation occurs respecting her not having been admitted, which would have been material had she been a

devisee merely, for then it is allowed on all hands that she could have passed no estate by her will before admittance. All, therefore, that the Court meant may have been, that quâcunque viâ datâ, whether she was in of her higher or of her inferior title—the devise by her was ineffectual; if of her higher, because there was no surrender; if of her lower, because there was neither admittance nor surrender. Then it is to be considered, that this part of the resolution, if, indeed, the observation is to be regarded as part of the resolution, is wholly immaterial to the question, both because the want of surrender makes the want of admittance of no consequence whatever, and because the lessor of the plaintiff is defeated, by the failure of his own title, after it is allowed that the defendant's is good for nothing. In truth, the whole question turns upon the plaintiff's title, who being heir ex parte paternâ was held to have no right to succeed to Jane Day (the devisor), if she took as heir to her mother, the first purchaser; and accordingly in another report of the case, (8 Mod. 23,) the point of the two titles is alone mentioned, and no allusion whatever is made to the observation upon admittance, so much commented on.

That observation, however, was made the ground of another, as little essential to the decision of the question before the Court, in *Wainwright v. Elwell*, 1 Madd. 627. This was the case of a devise by the devisee of a copyhold, and not by the heir; and it was decided most correctly, according to all the principles and all the authorities. But the dictum proceeding upon the dictum in *Smith v.*

Triggs was wholly beside the question; and it must be observed, that the reference to *Smith v. Triggs*, in p. 636 of Maddocks, is not accurate any more than the reference to the case at bar in the same passage, the expression, "the will in favour of Eliz. Elwell," having no intelligible meaning; so that there may be some error in the report; and this may possibly be classed among those "obiter dicta" of which Lord C. J. Willes says that he had frequently found them to be "numquam dicta."

The only other dictum (for it is no more) which could raise this doubt, is that in *Rex v. Brewers' Company*, 3 Barn. & Cress. 172, and to which I observe no reference is made by the Court of King's Bench in deciding *Right v. Banks*, although unquestionably it is just as strong, and I may be allowed to add as wrong, as any of the observations in the Court of Chancery, to which the Court of King's Bench refers. The practice of refusing a mandamus to admit the heir-at-law, which the Court had always acted upon and distinctly recognized in *Rex v. Rennett*, was here departed from; and apparently on good grounds. And the next case, *Rex v. Bonsal* (3 Barn. & Cress. 173), shows, that the Court considered itself to have thus overruled *Rex v. Rennett*. But in overruling that case the ground on which it rested is left unshaken; viz. that the heir, before admittance, has a good title against all but the Lord; indeed, that is quite uncontested; and the Court goes upon this other view, which seems also perfectly sound, that the heir

may wish to be a complete copyholder, which till admittance he is not. We may remark, that in giving examples of those things which he may wish to be enabled to do, such as being put on the homage and named for manor offices, the Court (or the Reporter possibly) inadvertently adds, "to surrender to the use of his will," which by all the cases he plainly could do, whether admitted or not.

From those dicta, more or less irrelevant to the main subject of the decisions, some question had arisen, and that is now set at rest by the discussion which the matter underwent in *Right v. Banks*. I am not of opinion, that the decision below in the present case could have been sustained, even if *Right v. Banks* had not occurred. It rests only upon the dicta to which I have adverted; and although the strongest, because the one least gratuitous and most bearing upon the matter in hand, is also the most recent,—I mean the reason given, (if, indeed, it was given,) for the mandamus against the Brewers' Company,—yet, that case seems also to have been much less considered than the others.

As far, then, as regards the objection to the title taken below, the decision must be understood to be overruled.



BROWN v. POCOCK.

LADY POCOCK bequeathed a sum of money upon trust for the maintenance and education of the three daughters of J. E. Brown during their minority, and upon their coming of age each was to have a third part of the income of the fund for life; and in case either of them should marry, then the testatrix declared that such third part should be "for the sole, separate, and particular use of such daughter so marrying during her life, and the dividends and interest thereof to be paid to her accordingly, but not by way of anticipation for her separate use." The Master of the Rolls had declined to make an order upon the petition of an assignee, under the circumstances stated in the judgment, of the third part of one of the daughters; and this was an appeal from his Honor's decision.

Sir E. Sugden for the appellant. Mr. Pepys and Mr. Cooper for the respondent.

May 31, 1833.

A clause against anticipation, but without forfeiture and gift over, does not prevent alienation.

LORD CHANCELLOR.—The point upon which this case turns is the effect of a clause of anticipation in a will. The bequest was in trust for the infant daughters of J. E. Brown; a sufficient sum for their education and maintenance was to be paid out of the interest of the fund till they reached twenty-one respectively, and the whole interest of each share was to be paid to each daughter for her life, as she reached twenty-one; and in case of marriage, then to her sole and separate use; but *not by way of anticipation*. One of the daughters attained the age of twenty-one in April 1832, and in June 1832 ex-

ecuted an assignment of her share of the interest to H. (the petitioner,) to secure the payment of a redeemable annuity of 40*l.* 10*s.* granted by her to him in consideration of a sum of money lent—of 400*l.* In October she married, and her husband and she now join in opposing the application of the grantee of the annuity to have the annuity, as it becomes due, paid out of her share of the interest of the trust fund, which is in Court; and they oppose the application on the ground of the prohibition to anticipate. The Master of the Rolls appears to have regarded the prohibition to anticipate as preventing the daughter from giving any security or obtaining any advance upon the credit of the fund; for he refused to make any order on the petition. I cannot agree with his Honor. I consider the prohibition quite ineffectual to tie up the fund. There is no gift over; and the legatee was not a feme covert. She was not indeed a feme covert either at the date of the will, or at the death of the testatrix, or at the date of the assignment. In order to support the view taken below, we must overrule all the cases, particularly *Barton v. Briscoe*, at the Rolls, Jac. 603; *Woodmesten v. Walker*, in this Court, (2 Russ. & Myl. 197;) and *Newton v. Reid*, before the Vice-Chancellor, 4 Sim. 141.

An attempt is made to distinguish this case from these; but there is not even a probable argument to sustain the distinction. In principle none of those cases differ from the present; and one of them, *Newton v. Reid*, would be the same to the letter, except that it is a stronger

decision than the one I am about to make. The fund was there directed by the will to be invested in purchasing an annuity for the unmarried daughter to her sole and separate use, in case she married; but she was not to be at liberty, in any way whatever, to sell, assign, or dispose of the annuity; or, if she did so, such sale was to be void and of no effect; the testator's intention being, if any accident in life should happen to her, that she should be kept from want. She married, and then, with her husband, assigned the fund, electing to take it and not the annuity; and it was assigned for money advanced to the husband. The Court held the restraint upon anticipation void, there being no gift over. The particulars in which that case differs from the present make it much stronger; for the prohibition is more particular and elaborate; and the assignment was not, as here, while the legatee was a feme sole; and though the sum in question was considerable, the decision, which was in 1830, has been acquiesced in.

Having, in *Woodmester v. Walker*, gone at large into the principles on which questions of this kind turn, I should not now have entered upon the further discussion of the cases, had it not been contended that there the legatee was not married, as she is in the present case. Upon the principle this can make no difference, the assignment having here been made when she was sole. But in *Newton v. Reid* this difference did not exist.

MALCOLM v. O'CALLAGHAN.

A LEGACY was by will given to the testator's two daughters, to be paid to them on their days of marriage, provided such marriage should be had with the consent and approbation of his executors, and the interest was in the meantime to be applied for their maintenance and education; and if either of the daughters should die before marriage with such consent, her share was to go to the survivor; and if both should die without being married with such consent, the whole legacy was to sink into the residue.

By a codicil the testator, after giving legacies to his two sons, directed that the legacies which he had bequeathed to his two sons and two daughters by his will and codicil should go and be possessed by the survivor of such of his sons, who should die before the attainment of twenty-five years, and of such of his daughters, who should die before such age or marriage with the consent of his executors.

One of the daughters who had attained twenty-five, but had previously married without the consent of the executors, claimed her share of the legacy.

LORD CHANCELLOR.—The will makes the share of the legacy vest only in the event of the daughter marrying with consent, and however revolting the consequence of such a construction may be, and how contrary soever to what might be supposed the testator's intention; yet the words are too strong to be got over, supposing the will to stand alone. Thus, to look a little at those consequences, it would follow, that however long either daughter might live, she never could entitle

May 31, 1833.

Legacy to be paid on marriage with consent; and given over in case of death before twenty-five or such marriage with consent: Held, that the legacy was only intended to go over in the event of death before twenty-five and such marriage with consent.

herself to the provision, unless she married with the consent. Again, however obediently to the executors she might act as to marriage, that is, however implicitly she might comply with the testator's desire to prevent her from contracting an improper alliance, as far as was in her power, still she could not receive the provision, unless she did an act not at all within her power; for it is plain that the most implicit compliance she could give was not to marry without the consent of the executors; but the legacy is only to vest if she marries with their consent; and though it might be possible to convert a proviso of this description, if it related to an annuity, into a forfeiture or defeazance on marrying without their consent, (from regard to what, in all probability, is always the intent of such a restriction,) yet when it relates to the payment of a legacy, it must be taken as only fixing the period of vesting. Notwithstanding these and other consequences equally revolting from this construction of the will, the words are too precise to allow any escape. No time is fixed for vesting—no other event than marriage with consent is specified—and the legacy is expressly given over on the decease of the legatee without being married with consent. We may conjecture and speculate upon the probability that the testator only intended to prevent a marriage against consent. But this is not what he has done; he has in clear and express terms done something else. We may even suppose that he meant to introduce the age of twenty-five, as he has with respect to the sons;

and the codicil seems to authorize the conjecture that he erroneously believed he had done so. But such a supposition is quite gratuitous and unauthorized, and adopting it would be to fancy and not to construe. The words of the will standing alone are not to be got over.

But then the violence which such a construction, however unavoidable, does to all supposition of a rational or even consistent intention in the testator, ought to make us look very astutely at the codicil, where the same subject-matter is dealt with; and if we there find another intention specified which is not repugnant to that in the will, but supplies something there omitted, and gives a more reasonable aspect to the whole, we are at liberty to take it altogether and modify the construction accordingly. Let us see what the codicil provides.

It confirms the legacy given to the two daughters. Therefore we are not at liberty to regard it as revoking, but must construe it, as far as may be, with the will. It then proceeds to give the share of the legacy over of such of the daughters as shall die before twenty-five, or marriage with consent. Taken most literally this is—that if either of the daughters shall die under twenty-five, or shall die before marriage with consent, her share goes over. But that is clearly inconsistent with the whole of the provisions as to consent, for it would occasion a forfeiture on decease under twenty-five, though there had been a marriage with consent; and among the gross absurdities flowing from such a construction there would be this, that

the daughter might marry with full approbation, and leave issue, and that issue would be deprived of all provision whatever if the daughter died under twenty-five. There is no way of avoiding these consequences if the words respecting age are allowed any meaning at all; and we clearly cannot reject them while they stand. If what follows, "or marriage with consent," be taken literally, the conclusion is inevitably both that death after twenty-five without marriage by consent, and that death under twenty-five, though with marriage by consent, makes the legacy go over. I think, therefore, that we must read the clause thus—"before such age *and* marriage with consent," that is, the legacy to go over if the daughter dies under twenty-five, unless she has married with consent. It is not enough that she dies under age. She must also die unmarried with consent. In truth, it is reading "*or*," "*and*." This construction, or reading, leaves the other event of living to twenty-five untouched in respect of the gift over; that is to say, it confines the gift over to the single event of death under age without marriage by consent, or if you choose to call it the two events, of death under age and unmarried—and death under age and married without consent. Can there be any reasonable doubt that this was the very thing the testator intended in the codicil, and that these were the only contingencies he had in his contemplation when he made the clause of survivorship in the codicil? If this be the meaning of the codicil, then it follows that in that codicil he provided for

the legacy only going over in the event of the death under twenty-five not married with consent; and consequently that it vested either on marriage with consent, though under age; or on attaining the age, whether married with consent or not.

But this is not repugnant to the will, or rescissory of it. The will says "In case the daughter dies, not married with consent, the legacy goes over." The codicil adds, "unless she reaches twenty-five," or more shortly "under twenty-five." That the confirmation in the codicil cannot be taken as a confirmation in all respects whatever, is clear; at least according to the construction agreed to be put on the survivorship clause: for the will makes the daughters' legacies survive between them alone, and the sons between them alone: whereas the codicil makes the legacy of each son or daughter survive to the other three. The codicil may thus be taken as explanatory or supplementary of the will. It is not a bequest different from that in the will; but it is a provision adding to and somewhat varying that in the will. It seems even to proceed upon the supposition that the provision in the will had been different from what it is; and to mention the age and the marriage as if both the one and the other had been previously specified, though in point of fact, the will had referred to the latter only.

Upon the whole, though far from considering the case as free from doubt, I think this construction the most reasonable; and that it is arrived at without doing violence to the words of the whole instrument taken together.

Re JORDEYN'S CHARITY.

ONE JORDEYN, by his will dated in 1468, directed the wardens of the Fishmongers' Company, out of the rents of certain premises thereby devised to them, to purvey, buy, and deliver 138 quarters of coal, or else money to buy the same coals, unto the same number, after the price of 8*d.* for every quarter of the said coals, to be disposed amongst poor persons by the advice and discretion of one good man or two of the parish, &c. ; and, after noticing that the sum total for the quarters at the price aforesaid was 4*l.* 12*s.*, he desired that if the coals were bought for less price, there should be delivered more coals. Coals having for many years greatly exceeded the price of 8*d.* per quarter, and the wardens distributing 4*l.* 12*s.* in lieu of them, a petition was presented under Sir S. Romilly's Act, to have the Company charged with the present cost of the coals, or with a sum bearing such proportion to the 4*l.* 12*s.* as the existing value of the premises should be found to bear to their value at the date of the devise. The petition had been dismissed by the Vice-Chancellor, and this was an appeal from his Honor's judgment.

Mr. Pepys and Mr. Bethel for the appellants. Sir E. Sugden and Mr. J. Romilly for the respondents.

May 31, 1833.

Construction of an ancient charge to purchase yearly 138 quarters of coal at 8*d.* per quarter.

LORD CHANCELLOR.—It is needless to inquire what might have been the construction of this gift, had it stood as set forth in the petition of appeal, viz. a direction to purvey, buy and deliver 138 quarters of coals, or else money to buy the same coals, unto the same number, after the price of 8*d.* for every quarter of the said coals, with regulations for the distribution among poor persons in different parts of the parish, and fol-

lowed by an absolute gift of the residue to the Fishmongers' Company. Neither is it now of any use to inquire what construction might have most reasonably been put upon this gift, or even upon the whole, as it appears in the will, and including the very material provision omitted in the petition, had we been considering the question before that series of decided cases, which has established a principle of construction not now to be questioned, as applicable to bequests like the present.

It is enough to observe,—first, that the construction of the whole appears on these principles plainly enough against the petitioners; more especially when the omitted part is taken into consideration; I mean the proviso that if the 138 quarters of coals can be bought for less than 4*l.* 12*s.*, then so much more shall be bought and distributed as shall cost that sum;—for it may be doubted if any of the decided cases have a stronger indication of an intention to confine the gift to a specified sum. Next, that if any other construction than his Honor the Vice-Chancellor has given to this bequest were adopted, it would shake a great number of foundations, where the funds have been dealt with upon the authority of the cases; and where interests have been created, and objects of the eleemosynary gifts may be said to have been called into existence, upon the faith of the principles which those cases have sanctioned. The appeal must be refused with costs. The omission of a material part of the will in the petition is very improper.

GUY v. SHARP.

THE following are the passages in the will and codicil of Robert Eales, which are the subject of this judgment.

"I give and bequeath unto my friends Mr. John Sharp, William Aldridge, and Thomas H. Bushnell, the sum of 9000*l.* now standing in my name in the new 5 per cent. government annuities, in trust to pay one moiety of the interest, dividends, and produce thereof unto my daughter Sarah, the wife of Stephen Clargo, and her assigns, for and during the term of her natural life, by half-yearly payments, the first payment thereof to begin and be made as soon as conveniently may be after the first dividends of the sum of 9000*l.* shall become due and payable next after my decease; and it is my will that my said daughter's share of and in the interest and dividends of the said 9000*l.* shall be wholly independent of and not subject to the debts, power, control, or engagements of her present or any future husband, and that her receipt alone (notwithstanding her coverture) shall be a good discharge at all times for the same; and from and immediately after the decease of my said daughter, I give and bequeath her said share of and in the said sum of 9000*l.*, and all interest which shall accrue from her decease, unto and among all and every her child and children as shall be then living, &c. But in case my said daughter Sarah shall depart this life without leaving any issue of her body lawfully begotten, then upon trust to pay the share of my said daughter of and in the interest, dividends, and produce of the said 9000*l.*, unto the said Stephen Clargo, for and during the term of his natural life; and from and immediately after his decease, upon trust to assign, transfer, or pay one moiety of the said 9000*l.*, and all interest and dividends then due thereon, equally between my son Robert and my daughter Elizabeth, their respective executors, administrators, or assigns. And as to the other moiety of the interest, dividends and produce of the said 9000*l.* upon trust to pay the

same to my daughter Elizabeth and her assigns, for and during the term of her natural life, by half-yearly payments, independent of any husband, and to go to her children, and if no children, to her husband, in the same manner as I have directed with respect to the interest and dividends of the other moiety ; and after her decease, in case she shall not have any husband then living, upon trust to assign, transfer, or pay the said moiety of the said 9000*l.* and all interest and dividends then due thereon, equally between my said daughter Sarah Clargo, and my said son Robert, their respective executors, administrators, or assigns."

"Whereas I, Robert Eales, of &c., have duly made and executed my last will and testament in writing, bearing date the 13th day of April, 1808, and have thereby given to my trustees therein named the sum of 9000*l.* new 5 per cent. government annuities, in trust to pay the same in moieties as therein is mentioned. Now I do hereby give unto my said trustees, (except William Aldridge, since deceased,) and James Long, their executors and administrators, the sum of 10,000*l.* new 5 per cent. government annuities, upon trust to pay one moiety thereof in the same manner as I have directed one moiety of the said 9000*l.* to be applied to and for the use and benefit of my daughter Sarah, the wife of Stephen Clargo, and her children, except only that in case my said daughter Sarah shall depart this life without leaving any child or children, then, and in such case, I direct my said trustees to pay the said moiety of the said sum of 10,000*l.* equally between my son Robert and my daughter Elizabeth, and not to pay the interest thereof, or of any part thereof, to the said Stephen Clargo, as I have directed the interest of the moiety of the said sum of 9000*l.* to be paid to him for his life, and upon further trust to pay and apply the other moiety of the said 10,000*l.* unto and for the use of my daughter Elizabeth, in such and the same manner in every respect as I have directed the moiety of the said sum of 9000*l.* to be paid, applied, and disposed of."

"And I appoint the said James Long a trustee and executor of my said will, in the room, place, and stead of the said William Aldridge, deceased ; and I give him the like sum of 10*l.* as I had given to the said William Aldridge ; and I ordain and declare this writing to be a codicil to my said will, and to be annexed thereto and taken as part thereof, and do confirm my said

will in every particular thereof, that is not hereby altered or revoked."

The will also bequeathed the residue of the testator's stock, and all other his personal estate, upon certain trusts, for the benefit of his widow, his son Robert, and of the children of Robert, and in default of such children, of his daughters, Sarah and Elizabeth.

The codicil was dated the 25th December, 1809.

The Vice-Chancellor having been of opinion that the legacy of 10,000*l.* new 5 per cents. was accumulative, there was a petition of appeal presented from his Honor's decision; and a supplemental suit was also instituted, in which evidence was taken, from which it appeared that the testator's stock in the 5 per cents. amounted to 12,000*l.* at the date of his will, and that his whole personalty was then about 20,000*l.*; that the stock remained unaltered at his death, but the other personalty was rather diminished; that between the dates of the will and the codicil he had quarrelled with Stephen Clargo; and lastly, that he had been heard to declare, that he meant the legacy bequeathed by the codicil, as a substitution for the legacy bequeathed by the will.

The case was argued on the one side by Mr. Tinney and Mr. Benson; and on the other by Sir Edward Sugden, Mr. Knight, Mr. Rayley, Mr. Wakefield, and Mr. Ching.

July 6, 1833.

A testator gave a legacy by will, and another of larger amount by codicil:—
Held, that he intended an accumulation, the latter legacy not corresponding either in nature or limitation with the former.

Remark on the difference between extrinsic evidence of declarations

of a testator, and extrinsic evidence of facts, such as the amount of his property, &c. The former inadmissible to aid the construction of his will.

Suggestion of a legislative enactment, that certain formulas when used in wills and other instruments should have, in law, certain prescribed significations.

LORD CHANCELLOR.—The question in this case was, whether the bequest of 10,000*l.* five per cents. in the codicil, was cumulative or substitutional to that of 9000*l.* in the will? This was the matter in discussion before his Honor, from whose judgment the case came by appeal. But in the supplemental suit now first brought here, two other questions have been raised touching the admissibility of two branches of evidence; one relating

to declarations of the testator's meaning and intention—which I rejected upon argument; the other relating to the amount of the property and circumstances of the family, which it is not necessary to deal with, because, admitting that evidence, and giving it a place in our consideration, I am of opinion that it would not alter the conclusion arrived at, from a due regard to the construction of the instruments themselves. I may, however, observe on the reception of extrinsic evidence, for the purpose of aiding construction and giving explanation, not for the purpose of contradicting or thwarting,—to effect which it never can be let in—that the difference is manifest between declarations, whether verbal or written, of a testator, and proof of facts and circumstances allowed to place the Court, which is called upon to construe, in the same situation with the party who made the instrument, in order the better to understand his meaning. The argument in favour of admitting declarations in *this* case was rested upon the ground that it is not a question of construction. But independent of *Hurst v. Beach*, 5 Madd. 351, I think that the present inquiry must proceed upon the construction of the codicil and will taken together.

In questions of this kind, the light to be derived from decided cases is of less importance than in most others. The object being in each instance to ascertain the intention of the testator, and the means to be used for this purpose being the examination of what he has actually said in the instrument, and not conjecture and argument upon

probability, it is clear that almost every thing must depend upon the particular circumstances of each case; that is, upon the very words of the instrument; and that the least variation in these may produce a wide difference in the result. The general resemblance of cases may carry us a little way towards a principle or rule of construction; but unless the circumstances are the same, or nearly the same, there will arise as much difficulty in applying the former rule as in making a new one.

Looking to the provisions in the two instruments now before us, and comparing them together, I agree with his Honor that the second bequest is cumulative; and I am further of opinion, though this is unnecessary to add after what I have said, that were it to be held substitutional, there could be no reason for holding former cases, and *Mackenzie v. Mackenzie*, 2 Russ. 262, and *Hurst v. Beach*, not to have been well decided; and I am not aware that they have even been questioned judicially, in so far as they relate to the point of cumulation and substitution.

First of all it is most material to observe, that the gift in the will is specific: "The sum of 9000*l.* now standing in my name in the new five per cent. government annuities," is as specific as words can make it. But the gift represented as substitutional, is as clearly general or pecuniary: "the sum of 10,000*l.* new five per cent. government annuities." The mere difference in the sum is of less importance; but the difference in the nature and kind of the subject-matter of the be-

quest is not easily to be got over. The preamble of the codicil, no doubt, mentions the 9000*l.* in the same terms, but then it does so after referring, or rather in the act of referring, to the bequest in the will : “ Whereas I have by my will of 13th April, 1808, given the sum of 9000*l.* new five per cent. annuities.” This reference makes the subject-matter of recital as specific as that of the will recited ; for it identifies the thing recited to have been bequeathed, with the thing bequeathed ; and there can be no difference in this respect between referring to a particular thing as in a certain place, and referring to it as stated in another instrument to be in that place. But the operative words of the codicil do not in any manner of way connect the 10,000*l.* with the description given of the 9000*l.* by reference to the will. Consequently, as the omission in the preamble does not make the latter bequest of stock general in the recital, so neither does the bequest in the codicil make the former stock specific in the gift.

The direction respecting Stephen Clargo is next to be considered. That the words are susceptible of the construction given them by those who contend for substitution, needs not be denied by the advocates of the contrary opinion. They are susceptible, and barely susceptible, of that construction ; but it is a forced and not the natural construction. “ As I have directed the interest of the moiety of the said sum of 9000*l.* to be paid to him for his life,” imports more naturally, “ because,” or “ seeing that,” or “ since,” and in this sense the provision is wholly inconsistent with

substitution, and decisive of the bequest being cumulative.

From the two particulars now mentioned, the difference of the bequests as regards the nature of the legacies, and the provision respecting Stephen Clargo's reversionary interest, it would follow, upon the supposition of the codicil being substitutional, first, that both the legatees, evidently the principal objects of the testator's bounty, would be, without any express words, placed in a worse situation than they had been under the will, though the codicil seemed to give them a little more in point of amount; and secondly, that Stephen Clargo would be wholly deprived of the interest he took under the will, and deprived without any express words of revocation; nay, more, by words at the best equivocal, and bearing two opposite meanings; but, in truth, by words of which the natural sense is the other way, and which sound in confirmation rather than in revocation. Nay, more still; he would be deprived of his interest under the will in a specific bequest, by words relating to a general bequest; words relating to a subject-matter not dealt with by the will, and which words, even if they had related to the subject-matter dealt with in the will, would not have implied revocation so naturally as confirmation. It may safely be asserted, not only that no case ever went so far as this, but that this construction is violent and not natural. It would be strong to hold that a direction connected with a general bequest of 10,000*l.* revokes a direction connected with a specific bequest of 9000*l.*; but stronger

still if those words are such as in themselves to rebut and not aid the presumption of substitution.

These are the main features of this case, and I therefore lay out of view the lesser matters, such as the arguments arising from the phraseology used in different parts of the instrument, although those arguments are in exact harmony with the supposition of cumulation, and help it, as far as they go. But I will say a few words upon those particulars from which the presumption of substitution is sought to be raised. The preamble at first sight seems to wear the appearance of reciting what had been provided in the will, in order to put some other arrangement in its place. "Whereas I have given 9000*l.* in my will; *now* I do *hereby* (that is, in this codicil,) give 10,000*l.*" But no stress can be laid upon this; for the recital may well be with a view of referring to the former gift in trust, in order to connect with it the new gift, that the latter may have a like destination.

Then the gift in the codicil being to the two surviving trustees of the will, and to a new one put in the place of one stated to have died, it is very plausibly argued that this would vest the 10,000*l.* in one set of trustees, while the 9000*l.* would remain vested in another set of trustees, unless the codicil were substitutional; and so no doubt this consequence would follow, but for the provision in a subsequent part of the codicil, where Long, the trustee of the 10,000*l.*, is expressly appointed trustee as well as executor of the will, in the place of Aldridge deceased, and has given to him the 10*l.* for trouble, which

had lapsed by Aldridge's death. This appointment destroys the force of the argument raised upon the former provision; but it does more, it aids the presumption of cumulation. The confirmatory clause, containing an exception of such parts as are not altered or revoked, appears to imply that there had been some alteration or revocation; and it is said that unless the direction touching Stephen Clargo's reversionary interest is to be deemed a revocation, there is nothing in the codicil to which the words can apply. But much stress ought not to be laid upon general words of saving, reserving, excepting. They are flung in *ob majorem cautelam*, frequently when there is no real occasion for them at all; and are thus apt to be extended, even where wanted, beyond the necessity. The words here are "altered *or* revoked." Now there are alterations; as with respect to the wife and son being punishable of waste; and "revoked" being added, and particularly added in the disjunctive, is far too narrow a ground to build upon.

This clause of confirmation, indeed, rather aids the view which has been taken below, and in which I concur. For the will is confirmed in all respects where it is not altered or revoked; and we may fairly argue that this means "expressly altered or revoked." Now surely it cannot be said that there is any thing in the codicil expressly altering, or revoking, the specific bequest of stock in the will. That specific legacy is left untouched, if the inference from provisions respecting another legacy of another parcel of stock does not ap-

proach towards it. Then if that specific legacy is not altered or revoked, the codicil confirms it. However the argument does not seem to require any aid from the confirmatory clause.

The admissibility of the evidence which was read *de bene esse*, needs not be discussed; for if it is admitted, and the full benefit of it given to the respondents, its import is not only not decisive in their favour, but it really seems consistent with, and even confirmatory of, the other construction,—that which has been adopted. The part relating to the circumstances of the testator, and the amount of his stock and other property, shows that he had a sufficient fund to satisfy the whole legacies, taking them to be cumulative; and it by no means follows of necessity, from the part of more questionable admissibility,—that relating to the quarrel with his son-in-law,—that he should have intended to revoke the reversionary interest which he had already given him. Possibly he might only be led by that circumstance to withhold a similar reversion in the additional bequest. It is clear that something much more precise is wanting to explain the words upon which the question is raised, and to make us take them in the sense contended for. To draw from the extrinsic facts proved, an inference in favour of substitution, would in this case be to control rather than to expound; and not only to control, but by equivocal facts to control, the sense of the instrument.

I have gone the more closely into this case and others of a like description, both because it is fit

to show the precise grounds upon which a meaning is ascribed to, or rather collected from, the frame of a will, and the words used in it; and because the knowledge that Courts deal anxiously and in minute detail with the expressions employed, is calculated to make parties, or at least their men of business, pay due attention to the terms which they select for the declaration of their intentions and the accomplishment of the purposes they have in view. In all cases where the question of cumulation or substitution arises, the controversy is occasioned by the omission of a few words; and where, as in the case at bar, the second instrument recites or refers to the gift in the first, the doubt is occasioned by the omission of a single word. Saying "besides," or "instead" would at once make the whole certain, and preclude the possibility of dispute. Much doubt and litigation would be prevented in all legal operations upon property of every kind, were the legislature to provide that certain formulas should have in law certain prescribed significations, receive a certain judicial construction, and produce a certain legal effect; not of course preventing parties from using whatever other forms of expression they might chuse; but ensuring them at least thus far, that they shall be able, without the chance of failure, to accomplish certain things by employing certain expressions. Until some such provisions are made, the Courts can only take care that by an anxious regard to each case, and by a strict application of the established rules of law, and the known principles of construction,

the meaning of the expressions used by the makers of instruments shall be, as far as is possible in practice, ascertained.

CHAMBERS v. WATERS.

THE facts may be collected from the judgment.

LORD CHANCELLOR.—In June, 1816, Waters purchased the Opera House ; and, in October of the same year, borrowed of Chambers, upon the security thereof, a considerable sum of money. On the 25th of August, 1817, Chambers made further advances, and Waters then signed an instrument by which he charged such advances on the premises, and covenanted to assign the same to Chambers in trust to sell for repayment of the loan ; but no sale was to take place without three months' notice to Waters ; and there was a provision that the power intended to be created might be exercised before the execution of the deeds which Waters covenanted to make. On the 26th of July, 1819, a deed was executed treating Waters as having authority to sell, and, by the intervention of Mills, the agent of Waters, the estate was in 1821 sold to Chambers.

July 6, 1833.

Specific performance resisted, on the ground that antecedently to the contract a trust for sale had been created in the purchaser, an incumbrancer in possession.

The first observation which arises upon these instruments is, that they are all along security rather than trust ; even the indenture of

August, 1817. Admitting it to be an executory trust, there is no ground for holding, that it extinguished the character of incumbrancer, which Chambers had, before it was executed, indeed ever since October, 1816, and which he had more extensively given him by this deed itself. He cannot be said to have clothed himself with the character of a trustee to sell, by merely having this further security made to him. In what relation he would have stood, had Waters performed his covenant and made the assignment, or had he (Chambers) demanded such assignment, or had he availed himself of the latter part of the deed, and exercised the power without waiting for an assignment, it is wholly needless to inquire; for, confessedly, nothing of all this took place. He held the instrument as a security; did not act under any powers which it gave, or obtain any of the powers which it covenanted to bestow; was in no respect whatever the seller, but only the purchaser from Waters, through another person, employed by him as his agent to sell; and therefore, while I do not object to the view taken in one part of the argument, here and below, and sanctioned by his Honor, that there was properly no trust to sell, I would be understood, as not giving any opinion upon this point, because it is really unnecessary to raise the question; the strong ground being, and on which I rely as wholly unquestionable, that even if Chambers was a trustee to sell, he never did sell to himself, but purchased in a way which no rule of the Court forbids; availing himself, in no respect,

of his position, even if he were considered a trustee, but dealing with the other party, as it were, at arms length. The deed of 26th July, 1819, indeed, appears to supersede that of August, 1817, and the power of selling is, throughout that deed, taken to be in Waters.

Then, is there any ground for the suggestion, that the sale to Chambers, in 1821, is fraudulent? And this question might be answered by another—what transaction can stand between men of mature age, acting with their eyes open, and surrounded both with friends and professional advisers, if this may be set aside? Upon the evidence I can see nothing whatever to impeach the contract. Not to mention the facts in themselves very material, though of only a general bearing upon the case, that a large sum of money was actually advanced four years before the sale, and that the lender might have become a purchaser in 1816, for 10,000*l.* less than he paid in 1821,—who can read the letters of Mr. Waters, and doubt that he knew precisely in what relation he stood to the other parties; that he understood the proceeding fully; that his free mind went along with what was done; that Mills was voluntarily and deliberately authorized by him to act as his agent, and that he was well satisfied with all he did on his behalf? It is needless to recite these documents; the letters of April, 1821, and September, 1821, are to Mills; but the letter of October, 1821, accompanying the engrossment, is to Chambers. “In affixing my name,” he says, “to the instrument which ac-

companies this, and which authorizes Mr. Mills to complete the sale of the Opera House, on my behalf, to you, allow me to express a hope, that nothing will occur during the period you hold it, that shall in the remotest degree cause you to regret the engagement you have entered into; but, on the contrary, that it may be productive of advantages not even contemplated by you at the present moment. In making this brief acknowledgment of what I feel the occasion demands, I take the opportunity of assuring you, that no occurrence of my life has been productive of so much regret as the difference which took place between us before I left London, fermented, I fear, in a great measure, by those who might have exercised a more friendly interference." And he concludes by sincerely wishing him every happiness he could himself desire. That Mr. Mills dictated this letter signifies very little, if any thing; it was written by Mr. Waters, in his own hand, and the confidence reposed by him in Mills, as his man of business, accounts for his thus availing himself of his assistance, or acting under his advice in composing it. The case set up, of a kind of conspiracy between Mills and Chambers signally fails; but even the subordinate attempt to show Mills in Chambers's employ, fails almost as signally; for the entry in Mills's book, if it were admitted in evidence, could only show that what oftentimes happens in such transactions, occurred here—the seller's man of business completing some unimportant matters pending at the date of the sale, and charging the purchaser

for his trouble after the property was transferred. The evidence is all one way in this case. I go no farther, nor is it necessary, than a deliberate authority to sell, given by a vendor, in the unquestioned use of his power over his property; that authority exercised openly and regularly; time given for repentance, if the vendor had changed his mind, inasmuch as the contract was not completed till ratification; that completion taking place of an inchoate act, valid as far as it went, rather than a confirmation of an infirm or a doubtful transaction; and taking place in the presence of the seller's nearest relative, himself a person of respectable station, and accustomed to business—such is the description of the proceeding, which the evidence gives, and gives uncontradicted.

Were it necessary to investigate the question of price and value, I am far from thinking that Mr. Chambers made a very beneficial purchase. To say nothing of Waters's own assertion after his first purchase, and setting that as the estimate of a purchaser against Chambers's opposite estimate, when he stood quasi a seller, the proof attempted from an offer of a somewhat mysterious nature, on the part of a company of noblemen and gentlemen, is not at all decisive, and we cannot, in considering such evidence, or the other suggestions as to the amount of rent and price of boxes, divest ourselves of the knowledge which every one must have, as to the nature and the risks of such property. In any view, and upon all this case, I concur entirely in the judgment of

the Court below, and affirm the Vice-Chancellor's decree, with the costs of the appeal.

GREENHOUGH *v.* GASKELL.

The Vice-Chancellor had dismissed a motion of the plaintiffs, that the defendant, a solicitor, might produce documents of the nature described by the judgment, and they now appealed from his Honor's order.

For the plaintiffs, Sir E. Sugden and Mr. Koe. For the defendant, Mr. Pepys and Mr. Spence.

July 31, 1833.

Disclosure of letters, written or received, entries made, papers possessed, or communications imparted, in character of solicitor, not to be enforced in equity nor at law.

LORD CHANCELLOR.—We are here to consider *not* the case which has frequently arisen in Courts of Equity, and more than once since I came into this Court, of a party called upon to produce his own communications with his professional advisers.—How far he may be compelled to do so, has at different times been matter of controversy; and in two cases before Lord Lyndhurst (*Hughes v. Biddulph*, 4 Russ. 190; and *Vent v. Pacey*, *ibid.* 193), and one since I sat here (*Bolton v. Liverpool Corporation*, ante, p. 19), the principle has been acted upon, that even the party himself cannot be compelled to disclose his own statements made to his counsel or solicitor in the suit pending, or with reference to that suit when in contemplation. But the party has no general privilege or protection. He is bound to disclose all he knows, and believes, and thinks, respecting his own case. And the authorities

therefore are, that he must disclose also the case he has laid before counsel for their opinion, unconnected with the suit itself.—*Here* the question relates to a solicitor who is called upon to produce the entries he had made in accounts, and the letters received by him, and those written, chiefly to his town agent, by him, or by his direction, in his character or situation of confidential solicitor to the party; and I am of opinion that he cannot be compelled to disclose papers delivered, or communications made to him, or letters written or entries made by him, in that capacity. To compel a party himself to answer on oath even as to his belief, or his thoughts, is one thing; nay, it is competent to compel him to disclose what he has written or spoken to others, not being his professional advisers; for such communications are not necessary to the conduct of judicial business and the defence and prosecution of men's rights by the aid of skilful persons. To force from the party himself the production of communications made by him to professional men, seems inconsistent with the possibility of an ignorant man safely resorting to professional advice, and can only be justified if the authority of decided cases warrants it. But no authority sanctions the much wilder violation of professional confidence, and in circumstances wholly different, which would be involved in compelling counsel, or attorneys, or solicitors, to disclose matters committed to them in their professional capacity; and which, but for their employment as professional men, they would not have become possessed of.

As regards counsel, attorneys or solicitors, it does not appear that the protection is qualified by any reference to proceedings pending or in contemplation. If, touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity, either from a client, or on his account, and for his benefit in the transaction of his business, or, which comes to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding it, but bound to withhold it; and will not be compelled to disclose the information, or produce the paper, in any Court of Law or Equity, as party or as witness. If this protection were confined to cases where proceedings had commenced, the rule would exclude the most confidential, and, it may be, the most important of all communications—those made with a view to being prepared, either for instituting or defending a suit, up to the instant that the process of the Court issued. If it were confined to proceedings begun or in contemplation, any communication would be unprotected, which a party makes with a view to his general defence against attacks which he apprehends, although at the time no one may have resolved to assail him. But even if allowed to extend over such communications, the protection would be insufficient, if it only included communications more or less connected with judicial proceedings; for a person oftentimes requires the aid of professional advice upon the subject of his

rights and his liabilities, with no reference to any particular litigation, and without any other reference to litigation generally than all human affairs have, in so far as every transaction may by possibility become the subject of judicial inquiry. It would be most mischievous, said the learned judges in the Common Pleas, if it could be doubted whether or not an attorney, consulted upon a man's title to an estate, was at liberty to divulge a flaw (*Cromack v. Heathcote*, 2 Brod. & Bing. 6).

The foundation of this rule is not difficult to find. It is not, as has sometimes been said, on account of any particular importance which the law attributes to the business of legal advisers, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers. But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations, which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources, and deprived of all professional assistance; he would not venture to consult any skilful person, or would only dare to tell his counsellors half his case. If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render

any proceedings successful, or all proceedings superfluous.

From the terms in which I have stated the proposition it is manifest that several cases may arise which, though apparently they are exceptions, yet do in reality come within it. Thus, the witness, or the defendant, treated as such, and called on to discover, must have learnt the matter in question only as a solicitor or counsel, and in no other way; therefore, if he was a party, and especially to a fraud, (and the case may be put of his becoming informed after being engaged in a conspiracy,) that is, if he were acting for himself—though he might also be employed for another—he would not be protected from disclosing; for here he did not obtain his knowledge *only* by his being employed professionally: and so, if you will examine the cases in which the protection has been refused, until the late *Nisi Prius* cases, of which I shall presently speak more in detail, you will find that they all range themselves within one or other of the following heads, which are deducible from the proposition, and in strict consistency with its terms. Those apparent exceptions are either, where the communication was made before the attorney was employed as such; or after his employment had ceased; or where, though consulted by a friend because he was an attorney, yet he refused to act as such, and was, therefore, only applied to as a friend; or where there could not be said in any correctness of speech to be a communication at all—as where a fact—something that was done—became known to him, from the circum-

stance of his being the attorney having brought him to a certain place, but which any man, if there, would have been equally cognisant of, (and even this is held privileged in some of the cases;) or where the matter communicated was not in its nature private, and could in no sense be deemed the subject of a confidential disclosure; or where the thing disclosed had no reference to the professional employment, though disclosed while the relation of attorney and client subsisted; or where the attorney made himself a subscribing witness, and thereby assuming another character for the occasion, adopted the duties which it imposes, and became bound to give evidence of all that a subscribing witness can be required to prove. In all such cases it is plain that the attorney is not called on to discover matters, which he can be said to have learnt by communication from his client, or on his client's behalf—matters which were so committed to him in his capacity of attorney—matters which in that capacity alone he had come to know.

I shall first advert to the cases which support the proposition, and then show that those referred to as impugning it, previous to 1819, are no exceptions to the rule, because they fall within one or other of the seven descriptions which I have just stated.

In a case in *Skinner* (*Anon*, p. 404), a *Nisi Prius* case, but before Lord Holt, an attorney, who had drawn an agreement between a sheriff and his under-sheriff, was examined to prove it a corrupt one. But the Lord Chief Justice held him not

bound to answer ; and it is to be observed, that the only ground taken there against the privilege, was his not being a counsellor ; and Lord Holt said, it is the same law of a scrivener : as indeed Lord Nottingham had said, in *Harvey v. Clayton*, 2 Swanst. 221 n., many years before, when he would not compel a scrivener to discover whose money he held in trust, or for whom, saying, if he did no man could thereafter employ him, and that a man shall not be wounded through the side of his scrivener. In *Gainsford v. Grammar*, 2 Camp. 9, Lord Ellenborough would not allow a person's attorney to be examined touching a proposition which he had carried from his client to the plaintiff, though no suit was then pending, nor in existence for several months after. His Lordship gives, apparently as a reason for considering that the witness was acting as an attorney and not as an ordinary agent, (the argument on the other side,) that an attorney might be confided in upon his retainer, in contemplation of a suit ; but he seems to rely simply upon its being a communication made to him while employed as an attorney. This was clearly the opinion of the same learned Judge in other cases, of which two are reported in *Espinasse*. In *Robson v. Kemp*, 5 Esp. 52, a solicitor was called who had been employed in preparing a warrant of attorney, and who had subscribed it as a witness ; and Lord Ellenborough held him not bound to answer any question as to what passed at the concoction and preparation of the instrument, for those were confided to him professionally, and by subscribing as a witness he

had only pledged himself to give evidence as to its execution; neither would he allow him to be examined as to its destruction, he having become acquainted with that only in his professional capacity. And so in *Brard v. Ackerman*, 5 Esp. 119, he would not allow an attorney to be examined as to the particulars of a bill of exchange which had come into his possession from his client. If it is possible that this bill may have been delivered to him post litem motam, it is at least quite clear in the former case that the transaction had no connection whatever with any suit commenced or in contemplation; for no one can maintain, without a great perversion of terms, that the warrant to confess judgment referred to a suit in the sense in which the term is used throughout the present argument. The case of *Cromack v. Heathcote* is the only other to which we need refer. It is clear and distinct, and is the only decision in banc upon the question. An attorney was called to prove fraud in an assignment, he having been asked to prepare the deed, by the party against whom he was called, which he had refused to do, and another had then been employed. The cases were all considered, and the Court held, that because the party consulted the attorney professionally and instructed him as an attorney, although, after receiving such communication, the latter refused to draw the deed, yet the knowledge he had was obtained in his professional capacity; and they were unanimously of opinion that the circumstance of there being no suit pending in any Court made no difference as to the protection. Mr.

Justice Richardson expressly puts the case of an attorney consulted on title, and says, he never heard of the rule being confined to attornies employed in a cause.

I have only adverted to such of the cases allowing the protection, as maintain the proposition in its largest extent, and distinctly exclude the qualification, of late partially introduced, of reference to legal proceedings. But it will now be satisfactory to examine the cases in which the protection has been refused, and to find that down to *Wadsworth v. Hamshaw*, 2 Brod. & Bing. 5 n., they afford no real exception to the rule, but come within the description already given of exceptions only in appearance. Indeed the greater part of them afford strong confirmation of it in the dicta of the Judges as to how the decisions would have gone had the facts been otherwise. In *Cutts v. Pickering*, 1 Vent. 197, the defendant had disclosed to A. B. that an erasure in a will had been made by him, but disclosed it before A. B. was his solicitor; —and it was held, that he might be examined, but secus, had the disclosure been after his retainer. *Lord Say's* case, 10 Mod. 40, was that of an attorney employed in levying a fine, and called to prove that the deed to lead the uses was not executed till five months after the date. The Court agreed that he could not be examined to prove his client's secrets, but that the execution of a deed was a fact that he might know aliunde and not a secret of his client. But here no distinction was taken as to matter disclosed in a suit, or preparatively to or connected with a suit, and

other secrets, or secrets otherwise learnt than in connection with a suit. In *Studdy v. Sanders*, 2 Dowl. & Ryl. 347, an attorney's clerk was allowed to identify a client as the person who put in an answer, as matter not confidentially disclosed to him. An opposite decision was made in *Rex v. Watkinson*, 2 Str. 1122, which was an indictment for perjury assigned on an answer in Chancery, when the master who took it could not identify the defendant; the solicitor who was present at putting it in was called, the Chief Justice would not compel him to give evidence, and the defendant was acquitted. Yet, here the identity must have been known to many others, and the putting in the answer, so far from being a secret disclosed, was in its very nature matter of publicity; consequently this case was not followed in *Studdy v. Sanders*; but if the latter case is allowed to be right in narrowing the protection, nothing is proved against my general proposition, for it falls within one of the exceptions. In *Doe v. Andrews*, 2 Cowp. 845, an attorney being attesting witness to an agreement, and refusing to prove it, there was a nonsuit. But the Court set it aside, holding, he was bound to give evidence on collateral points, and that whoever becomes a witness to an instrument pledges himself to give evidence on it whenever called upon. Here the attorney had been mixed up with the transaction, and not as a professional man; for though attornies often witness deeds, that is accidental, and they do not attest as attornies. An attorney witnessing makes himself, as Lord Ellenborough says in one

of the *Nisi Prius* cases, "a public man," as to proving the execution, and is no longer to be regarded as an attorney. In *Cobden v. Kendrick*, 4 Term R. 431, communications from client to attorney after the action was compromised, were held not privileged, clearly because they were not made professionally, but by way of idle and useless conversation,—“I am glad it has been settled—for I only gave £10 and my note—it was a lottery transaction.” Had this been confided with a view to some further proceedings, or had it, without any regard to a suit, been communicated for a purpose of business, it would certainly have been protected. In *Duffin v. Smith*, Peake, 108, usury in a mortgage was proved by the plaintiff's attorney, who prepared the deed, and whom the defendant called to prove the consideration usurious. Lord Kenyon said, that when the attorney himself is as it were a party to the original transaction, *that* does not come to his knowledge in the character of an attorney, and he is liable to be examined the same as another. It may be doubted if the attorney preparing the deed is not confidentially intrusted as an attorney in so doing; but Lord Kenyon proceeds upon the assumption that he is not—that on the contrary he is quasi party; and he seems to liken the case to that of a co-conspirator, where clearly there is no protection. Had he not deemed him the party acting, rather than the attorney entrusted—the principal rather than the agent—it is plain his Lordship would have held him exempt from interrogation. In *Wilson v. Rastall*, 4 Term R. 753, an attorney being called was held com-

pellable to produce letters placed in his hands by the wife of another witness, who had, he said, consulted him in his profession as a confidential person both before and after the wife gave him the letters;—the letters, though not given with the husband's privity, were nevertheless kept with his privity and consent; and the attorney also stated that the letters were communicated to him in consequence of the defendant (Rastall) having consulted him professionally. But then he further stated that he was under-sheriff, and had on this account refused to be employed as an attorney, either for such witness or the defendant; and, therefore, all that could be said was, that he had been confidentially consulted by friends, who selected him for this purpose, because of his professional knowledge. The Court, and particularly Mr. Justice Buller, put the decision on this ground, that the letters were not given to him in his professional capacity.

So stand the authorities on both sides, or, I should rather say, all substantially on one side, previous to the year 1819, the date of the first case that I can find in which the rule was laid down with the qualification that the communication, in order to be protected, must relate to a cause. That is also the case in which the qualification is stated the most largely or with the greatest effect upon the rule. It is a *Nisi Prius* decision of Lord Tenterden at Guildhall, *Wadsworth v. Hamshaw*, and it is given in a note to *Cromack v. Heathcote*. The question was, whether the defendants were partners when certain goods

were delivered ; and their attorney was called by the plaintiff to prove that they had consulted him professionally respecting the dissolution of their partnership. The Lord Chief Justice considered that the communication was not privileged—holding, that the protection extended only to those communications which relate to a cause existing at the time of such communication, or then about to be commenced; and he cited a case from the midland circuit, which came upon motion into the Court of King's Bench—a case to which he frequently referred upon questions of this kind, and of which a better account is to be found in *Clark v. Clark*, 2 Moo. & Malk. 3. Lord Tenterden, as I have often heard him say, was disposed to hold this privilege more strictly—that is, to allow it more sparingly than other judges; indeed he makes a similar remark in one of the cases reported; but in none did he ever lay the rule down with so large an exception as here; and from what he afterwards says in *Clark v. Clark*, it can hardly be doubted that the report makes him restrict the privilege more than he intended. It would follow from the decision, if the words are to be taken literally, that a communication, however confidential, made to a professional man, with a view to the client's defence against any proceedings which might be commenced, would be without protection, because the disclosure was not on the eve of the suit. The doctrine is re-affirmed, though not perhaps quite so largely, in *Williams v. Mundie*, Ry. & Moo. 34. This was also at Guildhall, in 1824, a few years after the former

case, from which it only differs inasmuch as the attorney was consulted by the defendants relative to the commencement, and not to the dissolution of the partnership, the question, as before, turning upon the partnership. And here Lord Tenterden allowed the examination, but stated the rule somewhat less strictly against the protection; saying he had invariably laid down, that what is communicated for the purpose of bringing an action or suit, or relating to a cause or suit existing at the time of the communication, is confidential, and privileged; but what an attorney learns otherwise than for the purpose of a cause or suit, he is bound to communicate.

It may be fairly said, taking these two cases together, that his Lordship would not have excluded communications made with a view to legal proceedings, though none such had either been commenced, or were about to be instituted. Lord Wynford, who in *Broad v. Pitt*, 1 Moo. & Malk. 234, adopts the doctrine, appears so to understand the case; for he says it is enough if a proceeding is instituted or apprehended. In this case, however, though Lord Wynford approves of the rule, no decision can be said to have been made, for the learned counsel for the plaintiff preferred proving their case by other evidence, not open to the same objection, and did not press for the disclosure, although the Court had ruled that they might have it.

When a judge of such eminence as Lord Tenterden states that the question is one to which he has given great consideration (*Williams v. Mundie*, Ry.

& Moo. 35), even the contrary current of other decisions would leave the Court under considerable anxiety in departing from so high an authority; and it is therefore very material to inquire if the opinion ascribed to his Lordship has not been either reported by others, or propounded by himself in the course of *Nisi Prius* proceedings, with somewhat of looseness; or, which would be as satisfactory, to ascertain that he was subsequently disposed to modify that opinion, supposing it both deliberately given and accurately represented in the first instance.

In *Clark v. Clark*, the attorney was called to prove a conversation with him, when consulted upon a transaction, for the purpose of showing it to be fraudulent. A dispute had arisen between the parties, but there were no proceedings pending, nor, it should seem, in preparation. The plaintiff only consulted his attorney as to his rights, and put one of the documents connected with the transaction into his hands, to get it stamped.—Lord Tenterden held that the protection extended to this case. His Lordship, referring to the reports, intimates an impression as existing on his mind that he had been made to state the rule narrower than he was likely to have laid it down. He allows that he has been more inclined to restrict it than other judges, and refers again to the case from the midland circuit in a way which proves that case to have gone on the undeniable proposition, that the communication, to be protected, must be made to the attorney in his professional capacity; and he concludes by hold-

ing the communication in this case to be privileged, because it was made to the attorney in his professional character, with respect to a matter then in dispute, although no cause was in existence with respect to it. But the distinction here taken, between dispute and no dispute having arisen, cannot be found in the cases ; and neither Lord Tenterden himself, nor the rest of the Court of King's Bench, could have taken it into their consideration in *Bramwell v. Lucas*, 2 Barn. & Cress. 745 ; for it would have put an end to the question there, and precluded the necessity of a very difficult and nice inquiry as to the nature of the communication. The question related to an act of bankruptcy ; and though bankruptcy, when proceeded upon, may be considered a suit, yet the act itself, out of which the proceedings may arise, is nothing of the kind ; nor could any dispute be said to exist, for the fact happened before the parties to the dispute, the assignees and petitioning creditor, could have any existence.

This case of *Bramwell v. Lucas* closes the examination, which I have felt called upon to institute, of the authorities, and it not only proves nothing against the general doctrine on which I have rested my opinion, but comes distinctly within the principle stated, and ranges itself with all the rest of what I have termed only apparent exceptions. An attorney of the name of Scott was called to prove his client's act of bankruptcy, by relating that a meeting of creditors being appointed, the client, Nokes, asked him if he (Nokes) could safely attend without being arrest-

ed : Scott advised Nokes to remain in his office till he could ascertain that they would give him safe conduct ; and Nokes accordingly remained two hours there to avoid arrest. Lord Tenterden, delivering the judgment of the Court, says, that the privilege is confined to communications to an attorney in his character of an attorney ; and that this was a question which might have been asked of any one else, and the information or advice might have been given by any one else as well as by an attorney ; that the witness recommended Nokes, not as a legal adviser, but as any agent or any friend might have recommended him, to stay where he was till a certain matter of fact could be ascertained. This decision, therefore, went upon the ground that the communication which passed between the parties was not professional as regarded the attorney. There may be some doubt whether the view of the fact taken by the Court was not somewhat bottomed in a refinement—whether the communication with Nokes was, in point of fact, in Scott's professional capacity. But the doctrine of law laid down in the case is free from all doubt,—it is, that the privilege shall be excluded where the communication is not made or received professionally and in the usual course of business.

The great importance of this question, both in equity and at law, has induced me to go thus largely into it. The rules of evidence are the same on both sides of the Hall :—the right which a party has on this side to a discovery from a

defendant of what was communicated to him in his professional capacity,—and the right which a party on either side has to obtain such information from a witness, are one and the same; nor do I believe that there will now be found any difference of opinion upon the question in the different Courts.^(a)

(a) His Lordship afterwards, in referring to this case, stated that he had consulted with the Judges of the other Courts, and communicated to them a note of this judgment, and that he had the satisfaction of finding that they acquiesced in it.

BLANCHARD *v.* CAWTHORN.

LORD CHANCELLOR.—This was the case of an injunction to restrain Mr. Walmesley from sporting in Wyersdale Forest, and to try three issues touching the right of warren and chase there, and the Vice-Chancellor refused a motion to dissolve the injunction, but ordered issues to be tried.

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Receiver authorized to let the shooting upon certain terms, pending an injunction until trial of issues respecting the right of warren.

I agree with his Honor so as to continue this injunction, and I consider the issues as quite sufficient to try the question between the parties. The injunction is necessary to protect the officer of the Court—the receiver. But I feel the hardship of the receiver letting the shooting, and if I saw any other way of preventing all the world from breaking in and destroying the game in this forest, I should be disposed to say, that neither Mr. Walmesley, nor those under leave and licence from the receiver, should sport there until the

issues are tried. But this course of proceeding, I fear, would not prove what it might be intended for, viz. a jubilee this year to the game in the forest—more probably the very reverse, a year of sorrow and destruction. Therefore, the receiver must continue as heretofore, but with an intimation, which I now make very distinctly, that he will, at his peril, as regards the duty he owes to the Court, suffer the sporting of any persons, other than those who pay him for leave, according to the terms on which alone he is authorized to let the shooting. He is, on no account whatever,—by no manner of means, to convert this power entrusted to him into an instrument of personal favour and private patronage. It must further be observed, that the Court will reluctantly maintain an injunction of this kind beyond the first moment when it is possible to dissolve it; and regard being had to the known difficulty of maintaining such rights at law as those which form the subject of the last issue, I am inclined to direct that this injunction shall be continued up to the trial, and only beyond that time in case the verdict shall be against Mr. Walmesley. As the carriage of the cause at law is with the other party, he must proceed to trial; if not, the injunction is to be dissolved on the last day of the assizes for the county of Lancaster.

This motion to dissolve must be refused, but without costs.

GLASSINGTON *v.* THWAITES.

LORD CHANCELLOR—The matter upon which the decision must turn in this case resolves itself into two questions. First, whether or not the true intent of the provisions in the partnership deed of 1816, is such as to render the transfer of shares valid, upon such notice as was given by the parties conveying to H. Thwaites the younger. Secondly, whether or not, admitting these provisions not to have been complied with, the plaintiff and other parties had adopted a course of proceeding, in respect of transfers, which authorized such a departure from the provisions. And the second question plainly does not arise unless the first be determined against the defendant. But a third question may also arise upon matter of detail, not provided for in the deed, and supplied by the course of acting, though not involving any departure from the provisions. The deed provides that weekly meetings shall be holden on every Wednesday, for the general conduct of the concern — a daily paper: and it is laid down, as a general rule, that all questions shall be decided by the majority in value of the shares, the proprietors of which are present at any meeting, except questions touching the payment or disposition of the partnership monies and other property; these requiring a consent of two-thirds of the whole proprietors, present and absent: and all the ordinary affairs of the

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A deed of partnership (in the Morning Herald newspaper) contained a clause that no proprietor should dispose of his share without first offering the same for sale, by notice in writing under his hand, to the other proprietors at a certain monthly meeting. It had been usual to enter at such meeting a notice of this offer in a book open to the inspection of all the proprietors both present and absent, but not to serve any notice personally. Held, whether regard were had to the words of the deed, or to the mode of acting, that such entry was a sufficient notice.

concern are to be transacted at the weekly meetings indiscriminately. But one kind of business is specially reserved for the last meeting in each month, namely, the offer of shares by proprietors willing to dispose of them; for a preemption is given to the body of the proprietors at large; and if the offer is refused by a majority in value, then any one proprietor may become the purchaser; and if more than one (though less than the majority in value) are willing to purchase, the share or shares to be disposed of must be divided equally among them.

This I take to be the plain meaning of the provision touching the transfer of shares and right of preemption; and we are now to see in what manner this provision is made effectual, by means of the notice prescribed for the offer, and the times fixed for the acceptance. The proprietors, it is stipulated, shall not sell or assign their shares, nor any part of the same, without first offering the same for sale, by notice in writing, under his or their hand or hands, to the other proprietors, at their monthly meeting on the last Wednesday in the month, at the sum or price ascertained, as therein-after mentioned. And if a majority in value of the said other proprietors, or some one proprietor, after the refusal of the majority in value, shall not accept such offer within one month after such offer being made, or do not within one month after such acceptance pay the price, then the proprietor desirous of selling may sell to any other person, such person becoming subject to all the covenants and clauses of the deed. Thus the ma-

majority in value are to have the first offer; and it is not quite clear whether a month's time is given the majority to accept or refuse, and if they refuse, a month after the refusal allowed to any individual proprietor or proprietors to accept; or whether the majority and the individual must both elect within the month. But nothing turns upon that in the present case; nor does any question arise upon the majority not having refused, for they must be taken to have done so, if the offer was regularly made; nor does any question arise upon the shares sold not having been equally divided among two or more individual proprietors; for it must be taken here that no such number had been minded to purchase, if the offer was regularly made. Upon that every thing depends, and to that we must now advert.

The offer to the parties having preemption (namely, the majority in value, and on their refusal the individual proprietors,) is secured, and all surprise upon them is precluded, by requiring that the offer shall be made to the proprietors at stated times, viz., the last meeting in each month only; and that it shall be made by notice in writing, under the vendor's hand, and that a month shall elapse before any sale can be made to a stranger. It is not particularly stated in what manner the notice shall be given; and from hence an argument is raised that the ordinary kind of notice, by personal service upon each proprietor, is to be intended. But this is wholly inconsistent with the provision that the notice in writing, or, which is the same thing, the offer

by notice in writing, that is, the offer in writing, shall be made to the proprietors, at their monthly meeting, on the last Wednesday in the month. If a statute or a contract requires a party to give notice in writing to other parties, without more, as a condition precedent to his validly doing any act, he must give each of these parties written notice; he must fix each with the receipt of such notice, or with wilfully refusing to receive it when it was sought to be given him. But it is otherwise where the notice is required to be given to those parties at a certain time and place, for then a mode of serving them is pointed out, and must be pursued. Moreover, it cannot be here said that only such as happen to be present at the monthly meeting were to have the offer, inasmuch as the acceptance of the majority in value of the proprietors, other than the vendor, is contemplated; and yet the offer is to be made at the monthly meeting. How can these things be reconciled? I think very plainly, by such a course as has been followed; and I can hardly see any other mode of reconciliation, except by some such course,—I mean the entering of a notice of the offer, at the monthly meeting, in a book open to the inspection of all proprietors. For this is making the offer of sale; it is making it by notice in writing; it is making it to the proprietors at their monthly meeting; and it is making it to all the proprietors, inasmuch as those absent at the meeting have a month in which to inspect the book, and observe the notice, before the sale can be made to a stranger. It is very much to be supposed that a personal service of

notice was not contemplated, or rather that it was intended to dispense with it. The absence of a single proprietor on the business of the concern, or on his private affairs—nay, his wilfully keeping out of the way—might have prevented all transfer of shares, not merely to strangers, but to one or more individuals, less than the majority in value, had such personal service been required. This is precluded by requiring the offer to be notified at a meeting; while the provision that this must be one particular meeting, and in writing, guards the body and the individuals against all surprise. Every one knows that on the last meeting of each month such notice may be given, and he may attend; or, if he has not been present, he knows that notice may have been given, and he may inquire. Again, it is true that a written notice to each person present, and not entered in a book, would comply with the words, if by “other proprietors” we were here to intend only those present. But as those words, coupled with the provision respecting the majority in value, must be taken to mean all the other proprietors, it is difficult to see how they can have the notice given at the meeting, unless by entering in a book open to all a notice at the meeting.

If this construction be the sound one, there is no occasion to examine in what way the parties have acted under the deed, with a view to ascertain whether or not they have agreed to a departure from its provisions, because the course pursued is no deviation. But their mode of acting may be of importance, in so far as, the deed being silent upon

the particular mode of giving the notice, we may supply this defect by resorting to the implied agreement of the parties, as to the way in which the provisions of the deed should be carried into effect, not departed from.

Now the evidence is clear and uncontradicted, that the minute book, or, as the plaintiff intitles it in his own hand-writing, the "minute book of proceedings of proprietors," was treated by the proprietors as an authentic record; that all had access to it; and that all had a right to enter minutes in it. The plaintiff availed himself of this right, and entered protests and made other entries. It is sworn that the plaintiff had access to the books generally, and to the room where they were kept, and took them into the room before the meetings, though he did not remain there himself, at least after the differences commenced between him and his partners. It is true that on the 29th September, 1819, an order is made at a meeting that H. Thwaites, jun. shall keep the minute book locked up, from whence it is inferred that Mr. Glassington after that time had not free access to it. But in the proceedings of the same meeting it is expressly provided that the books shall be accessible to all the proprietors who require to see them; and there is no evidence whatever, indeed it seems not even to be suggested, that he or any one else was ever refused access. When we find so many instances of offers of sale notified by entry under the hand of the proprietors desirous of selling, in the minute book, under the head of the monthly meeting, and in a book thus open to all

the proprietors, and in which the plaintiff as well as others made entries from time to time; it is impossible to doubt that they all, and Mr. G. among the rest, were cognisant of and consenting to the mode adopted of giving notice; and when it is not denied, nay, it is alleged by the plaintiff himself, that in most of those instances no other notice was given except by such entry, the inference is irresistible, that the construction put by general consent upon the provisions of the deed was, that notice in the book should be sufficient.

But Mr. Glassington's admissions are yet more distinct and binding upon him. He swears two affidavits in which Mr. Thwaites, jun. swears with him; represents himself as having become a shareholder, and executes a deed reciting his (Mr. T. junior's) purchase of shares; nay, in one of the affidavits, shares are stated to have been duly assigned to him by Mr. Thwaites, senior, and in another the transfer is stated to have been made after due notice given. Whatever notice that was, Mr. G. thus admits it to have been a valid notice within the provisions of the partnership deed. Whatever mode of assignment was adopted, he admits it to be good according to those provisions. But he must of necessity have known that the only notice, on which those transfers had been made, was by entry in the minute book, for he knew that he himself, being a proprietor, had received none other, which he must have done had previous service on each individual been the method pursued. After this he never can be

heard to say that notification of the offer in the minute book is insufficient ; and he is thus concluded as regards transfers subsequent to the date of those affidavits and those deeds. As regards the transfers before, there cannot be a question ; he cannot of course be heard to aver against his oath, his hand, and his seal. But as regards all other transfers made in the same way, the inference excluding his objection to them is nearly as strong, for he thus adopts a course of dealing, a construction practically given by the partners to the proviso of their deed. He sanctions a mode of acting under the deed, and whether it be a departure from the provisions, as he now contends, or, as I am of opinion it must be considered, a method of proceeding conformable to its true intent, and only filling up in detail what the deed had not particularized—in either case, he has admitted and approved the course pursued in all the sales which he now questions, namely, offer by notification in the book at a monthly meeting.

LYDE v. MYNN.

THE ensuing are the only sections of the Bankruptcy Act, 6 Geo. 4, c. 16, which relate to this case, the circumstances of which the judgment amply details.

Sect. 54. ‘ And be it enacted, that any annuity creditor of any bankrupt, by whatever assurance the same be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity, which value the commissioners shall ascertain, regard being had to the original price given for the said annuity, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the date of the commission.

Sect. 56. ‘ And be it enacted, that if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon ; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt and receive dividend with the other creditors, not disturbing any former dividend, provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed.

Sect. 121. ‘ And be it enacted, that every bankrupt who shall have duly surrendered and in all things conformed himself to the laws in force concerning bankrupts, at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands hereby made proveable under the commission, in case he

shall obtain a certificate of such conformity so signed and allowed, and subject to such provisions as hereinafter directed,' &c.

Counsel for the plaintiff, Mr. Pepys, Mr. Tinney, and Mr. Parker. For the defendant, Sir E. Sugden and Mr. Wakefield.

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Covenant to charge an annuity on any property, which might come to the grantor by his wife's death, not barred by his becoming bankrupt and obtaining his certificate.

Such a covenant not void as regarding a mere expectancy.

LORD CHANCELLOR.—The question in this case is, Whether or not Bankruptcy and Certificate bar the right of a covenantee to have a security, which the trader had before bankruptcy covenanted to give over property that had not then accrued to him, but might by possibility come to him under the will of a person then living; and in this question another is involved, touching the validity of such a covenant. And I agree with his Honor, the Vice-Chancellor, in holding the covenant good, and that the right is not barred, but that the bankrupt is bound to make the security over the property he took under the will, after his bankruptcy and certificate.

Mrs. Mynn, the bankrupt's wife, had reserved a power by their marriage settlement to dispose of her separate estate; and Mynn, the bankrupt, having granted Lyde an annuity of 160*l.* for the price of 1110*l.*, covenanted to charge it on any property, which might come to him by his wife's death. He afterwards was made a bankrupt, and obtained his certificate. His wife died after that, and, by a will made before the bankruptcy, but after the covenant was executed, she left him an annuity of 700*l.* a year. Lyde filed his bill, to have a portion of this set apart for payment of the annuity granted to him by Mynn, and

which he had covenanted to secure on whatever should come to him upon his wife's death.

That the claim to the annuity is barred by the statute cannot be denied; for it was calculable, and might be proved under the commission. But the covenant to secure that annuity gave a right which could not in any way be made the subject either of calculation or of proof; and it seems impossible to understand how it could be barred. Consider the nature of the interest which the covenantor had, which alone at the execution of the covenant he could pass, and which therefore must be the measure of the covenantee's proof under the commission; and it will appear that all proof was out of the question in such a matter, and that consequently the discharging power of the certificate is destroyed with its correlative, the power of proving. The bankrupt's wife was alive at the execution of the covenant, and the only interest he had, and over which he covenanted to give a security, was what she might choose to leave him by her will. He bound himself, if he eventually should take any thing under that will, to give his covenantee a security over it. It is impossible to treat this as a contingent debt; it is in truth no debt at all; it is a mere personal obligation to do a certain thing in a most uncertain event. If the covenantee attempted to prove in respect of it, how was it possible for the Commissioners to ascertain the value thereof, and admit him to prove the amount so ascertained, as the 56th section of the Bankrupt Act directs? But it is plainly not at all

like a debt payable upon a contingency, which forms the subject of that section. The Court of King's Bench, in *Taylor v. Young*, 3 Barn. & Ald. 525, held it too clear to admit an argument, that no value could be put upon a covenant to perform covenants, and that therefore the covenantor's bankruptcy could not be pleaded in bar to an action upon such a covenant. But the difficulty of valuing such a covenant as the one in this case is very much greater than in valuing that.

Another point is however made: The covenant itself is contended to be void as regarding a mere expectancy; and the cases in 2 P. Will., *Beckley v. Newland*, p. 182, and *Hobson v. Trevor*, p. 191, in Lord Macclesfield's time, are said to have been shaken by later cases, and particularly by *Harwood v. Tooke*, 2 Sim. 192. But so far is this from being correct, that, on the contrary, of those later cases some recognise the authority of the older ones, and carry the principles there admitted somewhat further; while none of them, when duly considered, indicate the least departure from the former decisions. In *Wethered v. Wethered*, 2 Sim. 183, beside the agreement to share expectancies, there was the additional circumstance of the relation in which the parties to the agreement stood to the party from whom the property, the subject-matter of agreement, was to be derived, and the consequent argument upon the impolicy of favouring arrangements in derogation of the parental authority. It was to share equally between them whatever of the real

or personal estates of their father might come to them at his decease, by devise or descent or otherwise, and also whatever he might advance to them in any way during his life. But the Vice-Chancellor, after considering the cases and denying that *Beckley v. Newland* was overruled by *Harwood v. Tooke*, which he justly considered rather to have upheld than shaken it, decreed a specific performance of the agreement; nor throughout the argument was any stress at all laid upon the transaction being a dealing with expectancies, but only on the relation in which the parties so dealing stood to him from whom the expectation was entertained. In *Morse v. Faulkner*, 3 Swanst. 429 n., there was nothing like a decision adverse to this. The Court agreed, that a person not having title to land and agreeing to sell, equity binds his conscience when the title accrues and compels him then to convey. But the inference was denied, that therefore the Court would interfere as against the heir of such a person not having title at the time of the contract. All this, however, was only said *arguendo*; for the Chief Baron expressly refuses to enter into the question, observing, that the sale was not such as it became the Court to take notice of. "A common soldier," said he, "goes down to a country alehouse, and, late at night, calls together two or three people, and offers to sell his estate; and then two persons bid for it, and the affair is all over. The transaction is not serious enough for this Court to interfere in, and the parties must take their course at law."

Then *Carleton v. Leighton*, 3 Mer. 667, decides nothing against the authority of the older cases; on the contrary, it expressly recognizes them, and it also recognizes their application to the present question; for *Beckley v. Newland*, and *Hobson v. Trevor*, were both cited in the argument; and Lord Eldon, referring to them, said (p. 671), that they were cases of covenant to settle or assign property which should fall to the covenantor, where the interest which passed by the covenant was not an interest in the land, but a right under the contract, and therefore that no interest in the estates passed by the bargain and sale. What *Carleton v. Leighton* actually decides (as far as the case bears upon the present question) is this:—not that a person may not validly deal with an expectancy, and bind himself to convey when his title shall accrue; but only that such an obligation is merely personal. He is bound, and he may be compelled to perform the contract when he can; but if he becomes bankrupt before the accruer of his title, he has no interest which passes by the assignment. This is plainly not only no authority against the contention of the plaintiff in the present case—it is, as far as it goes, all in his favour. It is further to be kept in mind, that Lord Hardwicke referred to those decisions of Lord Macclesfield, in *Wright v. Wright*, 1 Ves. sen., 409, and followed their principle.

Upon the second point made, I am therefore of opinion that the argument against the plaintiff's right fails entirely.

One circumstance in this case, which has led

me to reconsider it with more anxiety than might otherwise have been requisite, is, that the debt, to secure which the covenant was given, that is, the annuity, being capable of valuation, it may be said there was a discharge of the debt itself by the certificate, and therefore the security for the debt must also be gone. But that by no means follows. The one was proveable—it was a debt; the other was a personal obligation to do an act in a certain event which did not happen till after the bankruptcy and certificate, and which might never have happened at all—it was no debt, though it related to a debt.

In every view of the case I think the judgment below right, and the appeal must be dismissed with costs.

ST. GEORGE v. WAKE.

It is not requisite to give the facts of this case more at length than they appear in the judgment.

Sir E. Sugden and Mr. Koe for Mr. and Mrs. St. George. Mr. Knight and Mr. J. Russell for Mr. and Mrs. Wake; and Sir C. Wetherell and Mr. Lynch for Landor.

LORD CHANCELLOR.—This was a suit instituted by Mr. St. George and his wife to set aside a deed, by which she conveyed to her sister, the

ing no evidence that it was concealed from the intended husband, and such conveyance being in favour of an only sister, and the husband having brought no accession to the matrimonial stock.

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A voluntary conveyance made by a lady previously to marriage not set aside, there be-

defendant, Mrs. Wake, her reversion expectant upon Mrs. Wake's death, without issue, in the sum of 1000*l.*, left by their aunt's will, and also an assignment of four Liverpool dock bonds worth 1200*l.*, also given to Mrs. Wake; both gifts being, it was alleged, obtained by fraud from Mrs. St. George, then Miss Noble; and both gifts being, it was further alleged, made while that marriage was in contemplation, which, four weeks after, was had between the two plaintiffs.

It is admitted that the deeds were without consideration; and the first ground on which it is sought to impeach them is that of fraud or surprise; advantage being, it is said, taken of Miss Noble's distress of mind, and no one being present to advise her, except the defendant, Landor, the aunt's solicitor, who suggested the release of the reversion, and Hutchinson, a friend of the family, who advised the assignment of the bonds. But I am clearly of opinion, that the case of fraud and surprise fails altogether. Landor had no interest whatever in the transaction, nor apparently had Hutchinson; and both might most fairly advise the arrangement in the relative situation of the two sisters, one of whom had just been disappointed by the aunt's will; which there is reason to believe Landor knew she had intended, but for her sudden death, to alter. Miss Noble, too, was a person of mature age, between thirty and forty, and, apparently, not without some knowledge of business. The account of the scene between the sisters, and of Mrs. Wake's alleged violence, even if it rested

on unexceptionable evidence, which it is far from doing, would not, by any means, be sufficient to invalidate what it may have had some tendency to occasion. Such expressions of feeling are incident to family disputes; and often mix themselves with arrangements by which they are allayed, without giving to the party induced to make concessions for so desirable an object any right afterwards to set them aside.

The other, and the main ground of reliance, is, that the deeds were in fraud of the intended husband's rights, upon the principle that a voluntary conveyance by a woman, while marriage is in contemplation, is avoidable by the husband, from whom it was concealed, or who, at least, had no notice of it. This principle has been often laid down, but very rarely acted upon to the extent of avoiding, by judicial decision, the conveyance in fraud of the future husband's rights. In almost all the cases where we find it recognized, there were circumstances which the Court laid hold of, to escape from the application of the rule, or which really took those cases out of the rule. Thus in *Hunt v. Matthews*, 1 Vern. 408; *King v. Cotton*, 2 P. Will. 674; *Strathmore v. Bowes*, 2 Bro. C. C. 345; 1 Ves. jun. 22; 2 Cox, 28; and 6 Bro. P. C. 427; *Ball v. Montgomery*, 2 Ves. jun. 191; *Blanchet v. Foster*, 2 Ves. sen. 264, there were abundance of acknowledgments of the rule by dicta; but in some of them, from the husband having had notice, and in the last from the bond having been given for a valuable consideration, there was no decree to set the trans-

action aside. In other cases, where there were decrees, the facts raising the question seem to have been mixed with special circumstances. Thus *Poulson v. Wellington*, 2 P. Will. 533, turned upon a recital in the settlement, which the Court (and afterwards the House of Lords) held to be an appointment; and which was therefore considered as preventing the conveyance made before the marriage, in default of appointment, from taking effect; and even *Carleton v. Dorset*, 2 Vern. 17, always supposed to be a plain decision on the principle, is encumbered with the statement, at least in the report, that the wife being crazed in her understanding, endeavoured to run away from her husband, and to stir up her creditors to sue him, and, with the corrected statement in the note, that the defendants, her trustees, stirred up her creditors to sue her husband; the settlement in question being one to her separate use. The case of *Edmonds v. Dennington*, cited in *Carleton v. Dorset*, proves nothing; for it was only that a second husband is not bound by a settlement made on a former marriage, of which he had no notice, and which gave the wife power to act as a feme sole, notwithstanding that first marriage. So *Lance v. Norman*, 2 Ch. Rep. 41, was a case of gross fraud, and even conspiracy; and, in *Howard v. Hooker*, *ibid.* 42, the marriage treaty, which had been broken off, was renewed, by representations that the husband was to have the wife's fortune, on which he made a handsome settlement upon her. How far the existence of a fraud upon the husband is necessary to the appli-

cation of the rule, appears both from the dicta of Lord Thurlow, in *Strathmore v. Bowes*, in 1 Ves. jun. (p. 28), and of Mr. Justice Buller, in the previous discussion of the same case, in 2 Bro. C. C. (p. 359); but still more clearly from two decisions, one of *Thomas v. Williams*, Mose. 177, where the release of a legacy without consideration, during a treaty of marriage, was supported against the husband, on the ground that he had never inquired after the bequest; and another, of *De Manneville v. Crompton*, 1 Ves. & Bea. 354, where Lord Eldon held that the husband could not be relieved against the voluntary giving up (for family reasons, which made it very fair to do so,) of a promissory note to a large amount, after instructions for the settlement had been given: (See particularly p. 358, where it appears clear that Lord Eldon proceeded upon the assumption that such was the fact:) though the settlement gave him a contingent interest in all the wife's bonds and notes, and there were none other. Lord E. decided on the ground that there was no evidence of the marriage taking place, upon a representation of the particulars or the amount of the property; and he considered that he should be going beyond any precedent were he to hold otherwise. Neither of these cases appear to have been cited in *Goddard v. Snow*, 1 Russ. 485, at the Rolls, where the principle has been carried further than in any other case. From the peculiar circumstances, it is certainly a strong decision; the husband never having known of the existence of the property, or indeed of any property belonging to his wife; and the convey-

CASES IN CHANCERY.

ance having taken place a long time before the marriage. But there was also great specialty in the case, and manifest contrivance and concealment.

It thus appears how little positive decision there is upon the point, independent of all special circumstances. The cases (and I think I have gone through them all) are either such as ended in allowing the conveyance to stand, on account of something which prevented the application of the principle while it was in general terms recognized,—or such as ended in setting aside the conveyance upon grounds wholly independent of the principle,—or such (and these are extremely few, two or three at most) as applied the principle to setting aside the conveyance, but in circumstances of gross fraud, and even conspiracy. It might perhaps be affirmed that, excepting *Goddard v. Snow*, no case exists of a conveyance by the wife, though without consideration, being set aside, simply because made during a treaty of marriage, and without the knowledge of the intended husband. Yet it is certain that all the cases in which the subject is approached treat the principle as one of undoubted acceptance in this Court; and it must be held to be the rule of the Court, to be gathered from an uniform current of dicta, though resting upon a very slender foundation of decision touching the simple point.

As, however, every thing depends upon the fraud supposed to be practised upon the husband, it is clearly essential to the application of the principle

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that the husband should, up to the moment of the marriage, have been kept in ignorance of the transaction. Furthermore, the cases would even seem to authorize us in taking all the circumstances of the parties into consideration, as the meritorious object of the conveyance, and the situation of the husband in point of pecuniary means. Thus, among the reasons for which the bill to set aside a settlement before marriage was dismissed in *King v. Cotton*, one was, that the husband was in mean circumstances—an Irish half-pay Lieutenant, who received a considerable sum with the wife, and did not so much as pretend he could settle any jointure upon her. This and another case, in 2 P. Will. (p. 358), arising out of the same facts, and going by the names of the same parties (*Cotton v. King*), appear to have been much discussed. The settlement was before the treaty of marriage, but it was found to have been concealed from the husband; it rather appeared, indeed, that a statement of her fortune had been laid before him, in which the property conveyed was represented as still her own. The reasonableness of making some provision for her children, while she remained sole, was also insisted on by the Court in the second of these cases, *King v. Cotton*, and the same view had been taken in the older decision, *Hunt v. Matthews*, where, however, the husband's privity to the deed appears to have been admitted. In the case of *De Manneville v. Crompton*, to which I have already referred, the Court went much into the circumstances, and relied greatly upon the arrangement being natural, and the course of the trans-

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action fair, between such near relatives as mother and daughter. Circumstances of this kind are certainly very material to rebut the inference of fraud upon which the doctrine rests. It is needless to remark, that there exists in the present case circumstances of a similar nature not undeserving of attention. The provision was not, it is true, for children, as in some of the former instances; but it was for an only sister, a sister too who had been deprived of the testatrix's bounty, the fund dealt with, by a marriage of which she disapproved, while the legatee herself, who had profited by her disappointment, was about to form an alliance equally displeasing to the same party. The husband had brought no accession to the matrimonial stock; any settlement by him was out of the question; and there can be no doubt whatever that the difference effected by the gift and assignment upon his intended wife's fortune, would not, had he known it, (as, indeed, I am disposed to think he did,) and been influenced by pecuniary considerations alone, have created even the least hesitation on his part in prosecuting the match. Upon these circumstances, however, and upon such as these, it is not necessary to dwell. They tend to show that the present case is as free from all matter of aggravation, as the few in which the principle has been applied, have been abundant in such matter. But there does not appear sufficient proof that the husband was ignorant of the transaction; indeed it is not quite so certain as I had at first supposed that the treaty was going on and the marriage

tended at the date of the gift; on this, however, I place no reliance. But the one thing needful in a case of this kind is wanting—the act does not appear clearly to have been done in fraud of the marital rights about to vest in the surviving plaintiff, for the evidence is wholly defective in showing that it was concealed from him; on the contrary, when the time that elapsed between the assignment and the marriage is considered, he being almost during the whole of the interval in constant intercourse with the lady and the family; and when it is further considered, that his near relatives, likewise upon the spot, were acquainted with the transactions, it is more likely that he should have known it than been ignorant of it.

Such being my opinion upon the facts, I do not think it necessary to inquire, whether the mere ignorance of the husband is or is not enough, that is, whether or not concealment must be shown as a necessary part of a case of fraud. With the exception of *Goddard v. Snow*, indeed, there will not be found any direct authority for holding, that the bare fact of the husband not knowing what had been done, is enough, without more; or that the transaction is fraudulent and void as against him, although nothing had been done to mislead him; and the authorities of Mr. Justice Buller, in one of the cases of *Lady Strathmore v. Bowes*, and of Lord Eldon, in *De Manneville v. Crompton*, are directly and strongly the other way. Yet, even in *Goddard v. Snow* it is to be observed, that the peculiar circumstance of the length of time during which first the courtship, and then the coverture lasted,

plainly showed a wilful and continued suppression of the fact. The husband lived ten years with his wife after courting her ten months, and only discovered it at her decease. Although, therefore, he could not be said to have been deceived as to her fortune, inasmuch as he never knew either that she had the money or had settled it, yet the inference is irresistible, from the length of time, that she carefully concealed from him what she had done. This inquiry, however, is rendered unnecessary in the present instance, because far from there being any proof of concealment or suppression of the truth, there is no good reason to believe even that there was simple ignorance of it; but rather room to suppose, according to the probabilities of the case, that the husband was aware of what had passed. It is not immaterial to this important part of the case, that the bill does not charge concealment from the intended husband, nor even bare want of knowledge on his part. It is therefore clear, upon all the points, that the decision below must be affirmed.

But it is said that Landor has not been allowed his costs by the decree; and no doubt fraud being charged and not proved, generally speaking, gives the party a right to his costs. Nevertheless, when I consider that the great haste in which the whole transaction was begun and finished before the intended husband's arrival, was the cause of all the suspicion which arose respecting it, although no imputation whatever rests upon the conduct of Landor, yet, as it may justly be said that a few days' delay, without injury to any

party, would have precluded all room for doubt, and prevented this suit, I cannot alter this part of the decree—but I give the costs of the appeal.

ARUNDELL *v.* ARUNDELL.

THE following is an abstract of those parts of the deed of the 21st August, 1820, to which the judgment relates :—

Such deed recited the sales and conveyances which had been from time to time made of certain estates, and that such estates were, when the sales took place, subject to a jointure rent-charge of 800*l.* a year in favour of the Dowager Lady Arundell for her life, but that the estates comprised in the several conveyances were conveyed freed and discharged from the jointure rent-charge, by and with the direction of the said Lady Arundell, under an agreement that the sums therein specified should be invested in the purchase of navy 5 per cent. annuities, in the names of trustees, who were to pay her the dividends for her life, upon account and in part discharge of her jointure rent-charge, and subject thereto upon the subsisting trusts of a former settlement : and the deed further recited that such investments had been made, and that the aforesaid sums constituted together 16,000*l.* 5 per cent. navy annuities, and completed the whole investment necessary and agreed upon for answering the said jointure rent-charge : and the deed witnessed, and, in further performance of the said agreement, it was declared that the trustees, parties thereto, should stand possessed of the said aggregate sum of 16,000*l.* 5 per cent. navy annuities, upon trust, during the life of the said Lady Arundell, to pay and apply the dividends and annual produce thereof, as the same should become due, unto the said Lady Arundell, during her natural life, in full discharge or satisfaction (as she did thereby accept the same) of her said jointure rent-charge of 800*l.*, and upon further trust to pay to her executors or administrators, in case of her death, either between the feast days of Lady-day and Mid-

summer-day, or between the feast days of Michaelmas-day and Christmas-day, so much and such proportion of the said dividends and annual produce as would be equivalent to one quarterly payment of the said jointure rent-charge of 800*l.*, and from and immediately after her decease, and full payment of the said yearly rent-charge, and all arrears thereof, upon trust to transfer the said sum of 16,000*l.* 5 per cent. navy annuities, and the dividends and annual produce thereof, unto the trustees of such former settlement.

Counsel for Lady Arundell, Sir E. Sugden, Mr. Rolfe, and Mr. G. L. Russell. For Lord Arundell, Mr. Pepys and Mr. Benson; and for the other parties the Attorney-General, Mr. West, and Mr. Wright.

August 3, 1833.

A jointress, having a rent-charge secured in the usual way by a trust term, concurred in selling and conveying the estate exonerated therefrom, a part of the purchase-money being laid out in the navy 5 per cents., the dividends of which she by deed declared she accepted in full discharge or satisfaction of such rent-charge. The income of this investment having, by the successive conversion of the navy 5 per cents. into 4 per cents. and 3½ per cents., become less than the amount of the rent-charge, it was held that the jointress

LORD CHANCELLOR.—By indentures of lease and release, made in 1818, the late Lord Arundell, in execution of a power given by a settlement dated the year before, charged certain estates with 800*l.* a-year as a jointure to his wife, the plaintiff in this cause. The estates subject to this jointure rent-charge were of much more than the yearly value of 800*l.* The trustees in whom the rent-charge was vested for the Lady Arundell had the usual power of entry and distress for the arrears, and a term of 200 years was further limited to them for raising arrears, should any remain unpaid, by demise, sale, or mortgage. Subject to this charge, the estates were vested in trust to sell to pay debts and invest the surplus in lands to be settled upon the family. That the Lady Arundell, therefore, had an effectual security upon those estates, to the full amount of her jointure, is undeniable. The rents were amply

was entitled to have the deficiency supplied out of the corpus of the stock.

Principle by which deeds and legislative enactments are to be construed.

sufficient, but, if any short-coming should take place, provision was made that the deficit should be supplied by sale or mortgage; and there is distinct reference in the deed of the 21st August, 1820, upon which the present question arises, to her right thus secured, and to the conveyance under which she had it. The whole may, therefore, be taken together as one:—and from the whole, as no doubt can exist respecting the situation in which she stood, so no question appears maintainable as to what must have been her meaning in the transfer which took place with her consent for the accommodation of the family. But the deed itself of August, 1820, without any reference to the prior conveyances, seems sufficient to point out the same things.

It soon became expedient, as was foreseen, for the trustees to act under their powers, and make a sale of part of the estates so subject to the Lady Arundell's jointure; and it was as plainly desirable that they should be enabled to give the purchasers a title disencumbered of that charge: but this of course they could not do without her concurrence. She gave her consent to the several sales of the property, and always upon condition that a portion of the price should be invested towards securing her an annuity equal to her rent-charge thus released. The declaration of trust recites those sales and investments *seriatim*. After referring to the sale of one part of the estate, and the investment of a portion of the proceeds, it then goes on, in like manner, to recite another sale, the discharge by the jointress,

and investment of part of the purchase money; and lastly, an investment also of another sum required to make up a sufficient capital for yielding the interest of 800*l.* a-year—and it closes the recitals with stating that the sums of stock so bought constituted together the sum of 16,000*l.* navy 5 per cents., and completed the whole investment necessary and agreed upon for answering the said jointure rent-charge.

As the 5 per cents. were afterwards, by act of parliament, turned into 4 per cents., yielding on a somewhat larger nominal capital the reduced annuity of 672*l.*, and by a subsequent act those 4 per cents. were reduced to 3½ per cents., yielding only 588*l.* a-year, the original income of 800*l.* thus suffered a defalcation of 212*l.*, or above a fourth part; and the question is, upon whom this loss shall fall—upon the jointress, who without consideration released her ample security over the estates to facilitate the sale for the benefit of the family, or upon the family, who obtained this benefit for nothing.

It is undeniable that if Lady A. chose to convert her security over the estates into a right to receive merely the interest of so much stock, be that interest more or less, she might validly make the exchange. She never could benefit by it; she never could increase her annuity; and then she might, as has eventually been the case, lose a portion. Still, if she chose, she might make the exchange with the benevolent purpose of aiding the family arrangement; a purpose, on her part quite disinterested, as neither she nor her issue

could, in the circumstances, derive any advantage from it. But such gifts are not to be presumed, and at least the frame of the instruments recording an intention of this kind must be plain and their language unequivocal; and as no one can doubt the probable intention, in the absence of expressions to exclude it that intention will prevail.

The last passage to which I referred in the declaration of trust, appears to indicate something like a substitution of the annuity from the stock, for the annuity from the estates; for it says, that the 16,000*l.* navy 5 per cents. complete the whole investment *necessary* and agreed upon for answering the jointure rent-charge. But this language "*necessary* and agreed upon," is by no means unequivocal: and it appears only to amount to this—that the 16,000*l.* stock was calculated as sufficient for the purpose in view—the governing purpose of the whole arrangement touching the discharges and investments; namely, the obtaining of a clear 800*l.* a-year for the jointress.

But the declaration of the trusts in the deed goes further than the recitals. The deed declares that the trustees should pay and apply the dividends and annual produce of the navy 5 per cents., as the same should become due, unto the said Lady Arundell during her natural life, in full discharge or satisfaction (as she did thereby accept ~~the~~ *the same*) of her said jointure rent-charge of 800*l.* Now it certainly cannot be doubted, that if these words had stood alone, and if we had known no more of the relative positions of the parties than

that a rent-charger had executed an instrument expressed in such words, she would have been confined to the stock annuity in substitution for the rent-charge. But, first, there are other words which indicate the intent that 800*l.* a-year, at all events, should be secured to Lady A. Secondly, there are the recitals stating the circumstances, which evidence what must have been the general intent; and, thirdly, there are words which, after a partial and apparent deviation from the general intent, recur to that intent, and can hardly receive any construction except such as is consistent with it.

First, the clause which I last read, and which raises the principal doubt in the case, is immediately followed by a direction that the trustees should, in the event of Lady Arundell's death in the interval between the quarter days, pay to her executors or administrators so much and such proportions of the dividends and annual produce as would be equivalent to one quarterly payment of the said jointure rent-charge of 800*l.*; not of the said annuity arising from 16,000*l.* navy 5 per cents., but of 800*l.*, a sum equal to the rent-charge, of which it was the representative. This provision of the deed, although it only relates to the arrears due on the quarter current at the death of Lady Arundell, yet indicates, as strongly as words can do, what the general intent of the whole instrument was in regard to the jointress's right; for it assumes that she was always to have 800*l.* a-year from the stock, in the place of the same sum from the estates.

Secondly, The recitals, as well as the provision just referred to, show that the intention which might be presumed to regulate this arrangement among the parties, was in fact that whereon they treated, concluded, and acted. And it may be further observed, that there is no recital setting forth that Lady Arundell, out of her love and affection for the family, and for the sake of helping on the family arrangement, was minded to convert her certain annuity of 800*l.*, well secured on the land, into a fluctuating annuity, which no change could raise, and almost any change must lower.

Thirdly, There are words immediately after those last cited which provide for the re-transfer of the stock to the uses of the settlement after the determination of Lady Arundell's life interest. How is the stock to be transferred, and subject to what deductions? "From and immediately after her decease, and full payment (that is, *after* full payment) of the same yearly rent-charge, and all arrears thereof, upon trust to transfer," &c. It is, then, to be transferred after full payment of the same yearly rent-charge, that is, 800*l.* and all *arrears thereof*, that is, of 800*l.* a-year; not after payment of the yearly interest upon the 16,000*l.* stock, and the arrears of that interest, but the rent-charge and its arrears. There is here, therefore, a manifest and complete recurrence to the general intent, after what may be reckoned an apparent or momentary departure from it in the earliest part of the clause.

I, at one time, was disposed to lay less stress
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upon this part of the instrument; considering, first, that the provision is confined to the event of Lady Arundell's decease, and the portion of the annuity belonging to the quarter in which she should die; and next, that the words "all arrears thereof," in the clause of transfer, might be satisfied by the arrears of that quarter in which she should die, and might be taken as relating only to those arrears. But a further reflection upon the words, whether as taken in themselves, or in their connection with the rest of the instrument, has convinced me that in soundness of construction they will bear no meaning save the one required to work out the general intent. I do not say that my original doubt, in this respect, has wholly vanished; but I think the reference to "yearly rent-charge, and all arrears thereof," is not to be got over; and my opinion, therefore, is made up without further hesitation on this point.

It needs hardly to be remarked, that if we look to the fact, and regard what really was in all human probability the view of the parties, no doubt ever entered their minds that the stock would always yield the sum required; and that therefore they never thought of making any provision for a short coming. But to such considerations we cannot look in construing the deeds of private individuals, or, indeed, in interpreting the enactments of the legislature, unless it be where we plainly perceive that any case which may arise is wholly omitted, and cannot be reached by the words employed; an inference against, and not in favour of, which we ought always to lean, where

in the one case the general intent of the parties is to be furthered, or in the other, the object of the lawgiver is remedial.

This case, like all others of the same kind, must stand on its own circumstances, and those authorities to which reference was made in the argument are not at all decisive of the present question; *Davies v. Wattier*, 1 Sim. & Stu. 463, and *May v. Bennett*, 1 Russ. 370. As far as they go, however, those cases are favourable to the course taken here, of raising the yearly deficiency by sale of the stock from time to time; for in both those instances, a deficit having arisen in annuities, from the conversion of one stock into another, the Court directed it to be supplied by sale of the corpus, unless it could be made good out of other funds liable to the charge.

The whole of the decree must, in this case, be affirmed; and that both as regards the refusal of Lord Arundell's costs, and those of Mr. Benedict Arundell and his child, out of the fund;—and the appeal must, moreover, be dismissed with costs, which I should not have given in a question of this nature, involving considerable nicety, and clogged with some difficulty, but for the relation in which the respondent, Lady Arundell, stands to the family and to the whole matter of the suit. She must not suffer by becoming a party to an arrangement altogether for their benefit, and from which she never could, out of Court, derive any advantage; for all she has eventually gained, has been the necessity of coming into Court by the resistance of her just claim.

PARKER v. DOWNING.

A DECREE, directing amongst other things an account, having been enrolled before an order to enroll nunc pro tunc had been drawn up, although after the fiat upon a petition for that order, but which petition did not state the date of the decree: an omission that had occasioned the order to be stopped;—an application was now made to vacate the enrolment.

Sir E. Sugden and Mr. Wakefield for the motion. Against it, Mr. Knight and Mr. J. Russell.

August 16,
1833.

Incorrectness of the proposition in some of the books of practice, that a decree for an account is never enrolled.

LORD CHANCELLOR.—In this case, which was that of an application to vacate the enrolment of a decree on the ground of irregularity and surprise, three points were made; and if it rested on either of the two first, the allegation of surprise and the position that the decree, being in part for an account, ought not to have been enrolled, I should have no doubt, and should refuse the motion.

For, first—the case of surprise fails upon the facts—nothing was said or done by the one party which entitled the other to contend that he had been misled or lulled into security; and that which was held in *Barnes v. Wilson*, 1 Russ. & Myl. 486, to be no surprise, seems quite as strong as any thing that can be alleged here. And next, the proposition that a decree for an account never is enrolled, though from an obscure report of a case before Lord Hardwicke, it has found its way into books of practice, is so ut-

terly untenable in principle, and so contrary indeed to the actual practice, that it cannot be admitted to any extent. The case referred to of *Staunton v. Oldham* is most imperfectly given in vol. 2 of Atkyns (p. 383), and I can find no report of it any where else. It is hardly possible that it could have been as there represented, for the matter was before the Court upon exceptions to the Master's report. Besides, the reason given, that defects are very frequent in cases of this nature, and therefore the decrees are left open that parties may be enabled to rehear where directions in a decree are imperfect, seems not exclusively applicable to the decree for an account, but may also in some measure be extended to the decree confirming the report upon the result of the account ; and if applied to that, the doctrine would withdraw every such cause from the appellate jurisdiction of the House of Lords, as long as any thing remained to be questioned ; and though we were to give the supposed rule no such extension at all, it would necessarily preclude an appeal to parliament, in any case where an account was decreed, and where that order was disputed by the party against whom it was made, even supposing there was nothing else in the decree.

Moreover, the principle of the rule applies as well to decrees where account forms a part, as where it is the only thing ordered ; and indeed if it does not, the present case, where there are several important declarations, would not fall within it. But to show the impossibility of this being the law of the Court, it seems sufficient

to remark how great a proportion of decrees upon matters of importance, involve, as part of them, an account. In the present case, the account does not bear a greater proportion in importance to the declaratory parts, than in most others. All those cases, then, would be unappealable to parliament, if the statement supposed to have been made by Lord Hardwicke in *Staunton v. Oldham* were the rule.

But it is clear that Lord Hardwicke himself did not so consider it. In one of the stages of a case which underwent great discussion, and on which he pronounced afterwards a very elaborate judgment, *Wright v. Wright*, reported anonymously in the first vol. of Vesey, sen. p. 326, but given with the names at p. 409 of the same volume; (I commented upon it lately in *Lyde v. Mynn*;) the enrolment was vacated on account of special circumstances, amounting to catching an advantage by too great dispatch; and in his observations upon the practice, Lord Hardwicke only says, that signing and enrolling is not to be encouraged, *especially* in decrees for an account; and adds, that Sir J. Jekyll said, "they ought not to be too quick." This shows that he only considered there should be no over-hasty enrolment of such decrees. Indeed this case should seem to have been itself one of an account; and yet no reliance is placed upon that, which would however have been decisive, had the rule been as stated in *Staunton v. Oldham*.

But a case occurred before Lord Eldon which seems to show that no such rule exists. *Char-*

man v. Charman, 16 Ves. 115, had been decided at the Rolls, and the decree being signed and enrolled, application was made to open it, for the purpose of appealing to this Court. The application was strenuously pressed; and it was refused, upon the ground that there being no irregularity, and the decree being on the merits, could not be opened. Now, from the report in the 14th volume of Vesey, p. 580, of the same case, at the Rolls, it appears plainly that an account of the real and personal estates of the testator must have been a part of the decree, and that would have brought the case as much within *Staunton v. Oldham* as the present case can be. Yet no one ever thought of vacating that enrolment on such a ground, although very strenuous efforts were evidently made to accomplish this object.

The only question therefore arises on the third point, and it is, Whether the irregularity in the present enrolment is such as to vitiate it? The time had elapsed within which the order requires a decree to be signed and enrolled at the option of either party, and special leave was required. The granting of it was a matter of course, upon a petition, stating the date of the decree, and craving to have it enrolled nunc pro tunc. A petition was presented, but the date was not set forth; therefore the order could not be made. Accordingly it now appears, that though the enrolment took place 2d February, 1833, no order was effectually made at that time. It was not drawn up, because the fiat for it was upon a petition defective in not

stating the date of the decree; without which, it is plain, the material words "nunc pro tunc" can have no meaning. For though there is on the face of the petition and fiat (the authority to draw up the order) a sufficient particularity to show what "nunc" refers to, there is nothing to show what is intended by "tunc." This I take to be the reason why the order was stopped, notwithstanding the fiat. Then the oversight being discovered the petition is amended by interlining the date; and this was done on Saturday morning, after the motion had been in part heard, and before the argument was concluded. The affidavit satisfactorily shows that the defendant's solicitor had given no directions for the interlineation, nor indeed any directions since last January; but the agent of his Clerk in Court swears that he filled up the blank left for the date; though I do not exactly see where any such blank was left. That it was irregular to alter in any way a petition on which my fiat had been signed, inasmuch as this was really altering the fiat after it had been issued, is unquestionable. But this consideration is immaterial to the point before us. At all events, and in whatever way the thing was done, no valid authority for signing and enrolling was in existence till long after the enrolment had taken place, and the plaintiff might have moved to recall the fiat and set aside for the irregularity an order proceeding upon it, had that been necessary. The enrolment itself, therefore, must be vacated for irregularity, as made out of time and without warrant.

Where a contest arises respecting enrolment, and the party desirous of appealing to the House of Lords supports his enrolment with that view, the leaning may be in his favour. But here the struggle is by the party desirous of rehearing in this Court, and he is resisted, not by a party wishing to appeal elsewhere, but by the party in possession of the decree, and only anxious to deprive his adversary of one kind of appeal—to exclude him from his election of rehearing at a small cost, instead of appealing at a heavy expense—or at least from his election of rehearing before he appeals. If there should be no leaning against this resistance, at any rate it is entitled to no particular favour. I feel the less reluctance therefore in granting this motion, although the slip which occasions it was of a merely technical nature.

Ex parte Low, Re Hobson.

THE sections of the Act 1 & 2 Will. 4, c. 56, which gave rise to the points determined by this judgment, are as follow:—

Sect. 3. 'That all such matters to be heard and determined in the said Court of Review, shall be brought on by way of petition, motion, or special case, according to the rules and regulations to be established, as hereinafter provided, subject to an appeal to the Lord Chancellor on matters of law and equity, or on the refusal or admission of evidence only; and in all cases of appeal to the Lord Chancellor by virtue of this act, such appeal shall be on a special case, and in no other mode whatsoever, except the Lord Chancellor shall in any case otherwise direct;

which special case shall be approved and certified by one of the judges of the said Court of Review in matters arising in the said Court, and by the judge trying the issue in matters arising out of the trial of issues, and the determination of such judge on the settlement of such case shall be final and conclusive, &c.

Sect. 31. 'That if such Commissioner or Subdivision Court shall determine any point of law or matter of equity, or decide on the refusal or admission of evidence in the case of any disputed debt, such matter may be brought under review of the Court of Review by the party who thinks himself aggrieved, and the proof of the debt shall be suspended until such appeal shall be disposed of, and a sum not exceeding any expected dividend or dividends on the debt in dispute in such proof may be set apart in the hands of the said Accountant-General until such decision be made; and in like manner there may be an appeal on the like matter of law or equity from the Court of Review to the Lord Chancellor.

Sect. 32. 'That if the Court of Review shall determine in any appeal touching any decision in matter of law upon the whole merits of any proof of debt, then the order of the said Court shall finally determine the question as to the said proof, unless an appeal to the Lord Chancellor be lodged within one month from such determination; and in case of such an appeal, the determination of the Lord Chancellor thereupon shall in like manner be final touching such proof; but if the appeal, either to the Court of Review or the Lord Chancellor, shall be allowed in relation to the admission or refusal of evidence, then and in that case the proof of the debt shall be again heard by the Commissioner or Subdivision Court, and the said evidence shall be then admitted or rejected accordingly.'

The matter was argued by Mr. Pepys and Mr. Whitmarsh, and Mr. Montagu and Mr. Wray.

August 15,
1833.

Under the Act
to establish a
Court in Bank-
ruptcy the re-
jection of evi-
dence as super-

LORD CHANCELLOR.—The Bankrupt Court Act, by sections 31 and 32 taken together, gives an appeal generally on matters of law and equity, *fluens*—as not carrying the party's case further—is not a ground of appeal.

Although the Lord Chancellor is empowered to direct that an appeal to him shall be *otherwise* than by special case, yet he has no authority with reference to the settlement of such special case.

and particularly on the admission or rejection of evidence. If then the Court of Review decide on rejecting or admitting evidence improperly, such decision may be appealed against. It might be so under the general provision, being "a matter of law and equity;" and the particular provision as to evidence may be, on the other hand, contended to have been added rather for the purpose of making it clear that an appeal should lie in such a case, than to extend the appellate jurisdiction to any cases not within the general provision. From this view of the statute it would follow, that if the Court rejected evidence because it considered it superfluous, as not carrying the party's case further, an appeal would not lie for this cause. But it may be said, on the other hand, that the admission and rejection of evidence being specifically mentioned in sections 31 and 32, as well as "matters of law and equity," something more must be intended than mere objections in point of law, and that all objections, of whatever kind, are included. But it is unnecessary to decide, in the present case, between those two constructions; for the admission of the circumstances offered to be proved would not countervail the other facts in the case; and if all were taken together there is enough to support the judgment of the Court below.

As to the settlement of the special case, and the suggestion that part was struck out, the third section makes the determination of the judge who settles it "final and conclusive," and the power reserved to the Chancellor to hear appeals "other-

wise" is not intended to meet such an emergency as the present. It was only to allow one course of proceeding instead of another, if he thought fit. A sound discretion must of course be exercised, governed by the particular circumstances. The rule is, to hear appeals on special cases; the exception is, where another course would be more expedient for the great ends of all judicature—right decision with reasonable dispatch. In what manner this discretion should be exercised is not pointed out in the act. There seems nothing to prevent the Chancellor from directing, *mero motu*, upon reading the case, that another course should be adopted; but that is not a very probable occurrence. A preliminary application for the purpose, by petition, would be most according to the analogy of proceedings in bankruptcy. But this would give rise to multiplicity of petitions; and I shall consider what rule may be best laid down on the subject. Here, however, no doubt can arise; for not only is it clear that this discretionary power has no reference to the decisions of the judges below on the settlement of the special case, but, even if it had, no application has been made, and therefore no exercise of the discretion has been called for. On the contrary, the party elected to proceed here by special case, and made no application complaining of the manner of settling it, or asking to proceed otherwise.

Ex parte SAUNDERS, *Re* CHRISTIE.

THIS was an appeal from the Court of Review upon a special case.

Sir E. Sugden and Mr. Jacob for the appellants. For the respondents, Mr. Swanston and Mr. Montagu.

August 15,
1833.

LORD CHANCELLOR.—It appears that the frame of the second issue directed in this case was not distinctly understood by the learned judge who tried it; for he seems to have considered that the Court desired only to have it ascertained, whether it was not the purpose of the partner who took out the commission to dissolve the partnership, which is in truth the regular operation of every commission; whereas the object which the Court had in view was to have it ascertained, whether or not the commission had been taken out by the one partner solely in order to compel the other to agree to a dissolution of the partnership on the terms proposed; because there could be no doubt whatever that, if such was the design of the petitioning creditor, the whole proceedings would be void. One event of the trial would therefore have at once disposed of the whole question one way, though the other event would not have been decisive in the opposite direction. It might therefore have been as well to direct a second issue to ascertain the matter to which the indorsement upon the postea relates, and I was strongly inclined at one time to think that this should still be done; but upon attentively con-

It is an abuse of the powers of the Great Seal to take out a commission with a view wholly foreign to the object of the bankrupt laws, as to determine a lease, stop an action, &c.

A commission superseded as having been taken out with the sole view of dissolving a partnership.

sidering the evidence in the cause, both in this Court and at the trial, (and I have also looked at the proceedings under the commission, and conferred with the learned judge who tried the cause,) I am of opinion that there is no doubt of the facts which are material—that those facts are as found by the jury—and that I am now entitled, without further inquiry, to take the case as standing thus:—The appellant, Saunders, took out the commission against Christie solely with the view of dissolving the partnership, and not with the view of going further and working the commission and causing the estate and effects of Christie to be distributed for the payment of his debts: for though he is not proved to have had no intention of working the commission, it is certain that he only intended to work it for the purpose of effecting that object of dissolution, and to work it so far as might be necessary for accomplishing that sole and governing purpose.

Although the suing out a commission of bankrupt is matter of right, yet the Court has always kept so much control over the proceeding, even in the first stage, as to see that its process is not abused. This discretion has of course been confined to the Court itself; and while elsewhere, *i. e.* in Courts of Law, the proceedings have been valid, —these Courts having no jurisdiction to inquire further than ascertaining how far the provisions of the statutes have been complied with—here, the conduct of the parties having the carriage of the commission has always been subject to review; and the whole proceedings, how firm soever at

law, have been set aside if the powers given by the commission have been perverted to purposes foreign to those for which they were bestowed. Thus Lord Loughborough superseded the commission which had been issued against Mr. Bowes, (*Ex parte Bowes*, 4 Ves. 168), on the ground that the act of bankruptcy had been committed above ten years before, and that it was plain the petitioning creditor had sued it out to help him in proceedings more recently instituted, both in law and equity, against his debtor. Yet there is nothing in the bankrupt law, which prevents a stale demand from being made the ground of a commission, or prohibits a creditor, in the course of other litigations, from obtaining the benefit of a commission under which he may make certain of being chosen assignee. Lord Loughborough, in the case I have mentioned, (p. 175,) said it was on the face of it not one in which the general relief of creditors was the object of the commission, but a particular question between Peacock and Bowes, which, instead of being to be determined upon the result of an account in this Court, or in an action, was to be decided in a bankruptcy, of which obviously Peacock must be able to give himself the whole management. Lord Eldon, referring to what Lord Loughborough there laid down, has observed, (*Ex parte Bourne*, 2 Gl. & Jam. 142,) that he had always heard it said, ever since he knew this Court, that if a commission be taken out for a particular purpose only, and not for the general benefit of the creditors, it is an abuse of

the great seal, and cannot stand. The constant practice of superseding, on the ground of concert, commissions perfectly valid at law, rested upon the same principle, and required a provision of the legislature to abolish it. Even where the object in view is not confined to the petitioning creditor alone, and where he has the meritorious purpose of facilitating a composition with the whole creditors, yet Lord Eldon has held (*Ex parte Bourne*, 16 Ves. 150,) the whole proceeding to deserve reprobation, as liable to abuse.

The rule I take to be this,—that if a commission is taken out wholly with a view foreign to the object of the bankrupt laws, as to determine a lease, stop an action, or dissolve a partnership, it shall not stand, because the powers of the great seal have been abused, and the process of the Court perverted to a purpose which it was never designed to serve. Cases may occur in which different motives combine to influence the petitioning creditor; and more objects than one may be attained by the proceeding; nor will the Court interfere where there has been no fraud, nor any improper or oppressive conduct, although other purposes may have been in view beside that of distributing the debtor's estate, and by-motives, as they were termed in *Ex parte Wilbran*, 5 Madd. 3, may have mixed themselves with the intentions of the party. Yet it is observable that Lord Eldon, although in this latter case he is said to have approved of the Vice Chancellor's refusal to supersede, could hardly have used the language which his Honor employed in giving the judgment,

consistently with what he afterwards stated in his elaborate judgment on the leading case, *Ex parte Bourne*, (2 Gl. & Jam. 142;) where it may be further observed, that he purposely abstains from dealing with the case of the party having a double purpose, one of which should be consistent with the legitimate objects of a commission.

It is needless to go more at length into the cases upon this point. With the exception of the dicta, rather than the decision before the Vice Chancellor, in *Ex parte Bourne*, (1 Gl. & Jam. 316,) in which Lord Eldon did not concur, and of the language, rather than the substance of *Ex parte Wilbran*, a case several years anterior to *Ex parte Bourne*, there is nothing to be found in the books which renders it at all questionable, that a commission sued out merely to get rid of a partner is supersedable at the expense of the party so abusing the process in bankruptcy.

In the present case the conduct of the petitioning creditor is deserving of no approbation; the circumstances are all against him, and he must pay the costs both below and of this appeal.



Ex parte ROBINSON, *Re* HOUGHTON AND WATTS.

THIS was also an appeal from the Court of Review upon a special case ;—the facts are set forth in the judgment.

For the appellants, Sir E. Sugden and Mr. Richards. For the respondents, Mr. Swanston and Mr. Montagu.

August 15,
1833.

An acceptance given by a solvent partner, after an act of bankruptcy committed by his copartner, to a creditor of the firm having notice of that act of bankruptcy, is proveable by a holder without such notice, under a commission of bankrupt subsequently issued against both partners.

Distinction to be found in some of the cases on the subject of acts done subsequently to the bankruptcy of one partner, between those which pass property, and those which render the firm liable.

LORD CHANCELLOR. — The question raised in this case is one of great importance, and upon which conflicting dicta, rather than decisions, are to be found in the books. It is, whether or not a solvent partner in a firm, one member of which has committed an act of bankruptcy, can make the firm liable by his acceptance for a partnership debt; the acceptance having come by indorsement into the hands of a *bonâ fide* holder for value, without notice of the act of bankruptcy?

The firm of Houghton and Watts were liable to Davis; and, after Houghton had become bankrupt, Watts, cognisant of his bankruptcy, gave Davis the acceptance of the firm, which he indorsed to Robinson. Davis knew that Houghton had absconded, and had committed an act of bankruptcy; but Robinson was ignorant of these circumstances. Watts afterwards became bankrupt; and a joint commission issued, under which Robinson sought to prove against the joint estate. The Commissioner before whom this point was raised allowed the proof. The Court of Review ordered it to be expunged, and the

question comes here on a Special Case, stating the facts of which I have given the substance.

It must be admitted, that the consequences would be most unfortunate were it settled to be the law that a bonâ fide holder of a bill, accepted by a firm, could not prove upon it, if it turned out to have been accepted after a secret act of bankruptcy had been committed by one of the partners. The extent to which this proposition would go, and its mischievous tendency, need not be pointed out.

The ground of the decision below appears to have been this. The bankruptcy dissolves the partnership, and lets in the assignees as tenants in common with the solvent partner, by relation back from the assignment under the commission to the act of bankruptcy; from whence it is inferred that nothing done by the solvent partner, without the concurrence of the assignees, can bind the joint property. In the very short note of the reasons given by the learned judges below, that is the ground of the judgment. But from thence another inference must be made before the present case can be decided as their Honors the Judges of the Court of Review have determined; namely, that because, in consequence of the tenancy in common, the solvent partner cannot bind the property of the firm, therefore he cannot render the firm liable, by his contracts with parties ignorant of the dissolution and bankruptcy, even although those contracts relate to prior liabilities of the firm.

That bankruptcy dissolves the partnership

when a commission issues, and there is an adjudication and assignment, and that the cesser of the partnership connection takes place from the act of bankruptcy, by relation, is unquestionable as a general position. But that it has every effect of a dissolution,—that it determines the partnership relation, to all intents and purposes, and makes it as if no such connection had ever subsisted, is not true. The dissolution being unknown to the world, all men are safe in contracting with the firm as if the partnership still existed. No one can doubt that if two parties secretly agree to dissolve on the 1st of January, and enter into a regular instrument of dissolution, and yet go on trading together as before, either may validly bind both on the 1st of February, by accepting a bill in the partnership name, and paying it away to a party ignorant of the dissolution. Does the circumstance of the dissolution having been effected by bankruptcy make any difference in the position of the *bonà fide* and ignorant holder? The case as decided below can only rest upon the supposition that this does make a difference, by letting in the assignees as tenants in common with the solvent partner. But suppose them tenants in common as regards the property, it does not follow that their being let in prevents the solvent partner from binding the firm, by contracting a new liability for an existing debt of the firm. Suppose there had been no partnership at all, that the bankrupt had been a sole trader, had accepted the bill himself, and had paid it to one ignorant of his having committed

an act of bankruptcy, it is clear that this holder could prove. The bankrupt could not indeed have validly transferred property after his act of bankruptcy, unless within the statutory exceptions; nor could he have indorsed the acceptance of another person, so as to give his indorsee an action against the acceptor; but he could bind himself, the indorser, by that indorsement, in case the bill were dishonoured; and his acceptance would certainly bind him in the hands of an innocent holder, and entitle such holder to prove under his commission. It can make no difference, that the acceptance is by the solvent partner of a firm, and not by the bankrupt himself, a sole trader. The acceptance binds in both cases until the bankruptcy is known, and may be proved upon. The indorsement by Davis to Robinson in this case puts him in the position which I have been assuming the party receiving the bill to stand in, namely, that of an innocent holder. If it be clear, which indeed cannot for a moment be doubted, that on a secret dissolution, without bankruptcy, an innocent holder of the partnership acceptance given by one partner, could sue both, ought the bankruptcy, which takes one partner out of the firm, to place that innocent holder in a worse situation, or ought it to place the assignees of the partner going out in a better situation than he could himself have been in? It might rather be contended the other way; at least that there is a reason the more in favour of the holder, where the secret act does not complete the dissolution, than where the dissolution is complete before the

acceptance was given. For in truth the act of bankruptcy is only an inchoate dissolution, to be perfected by the assignment under the commission; and it would be difficult to show why the party who takes an acceptance of the firm during the interval between the inception and the completion of the severance, and at a time when events might prevent that completion altogether, should be in a worse position than if he had taken it after that severance was complete, and the partnership wholly determined.

If we look to the cases, we shall find that, while there are none in this Court directly against the view which I take of the question, while at law there is no case either directly or indirectly against it, and while there is a current of authority plainly in its favour, yet there are one or two cases, which proceed upon principles not easily reconcileable with others of high authority and recent date. The only case in Banc that I know of, which seems to differ from *Harvey v. Crickett*, 5 Mau. & Sel. 336, is that of *Thomason v. Frere*, 10 East, 418, where, there being three partners, it was held that an indorsement by two, after acts of bankruptcy committed by them, could not transfer the partnership interest in an acceptance, a separate commission having afterwards issued against them, and the third, the solvent partner, being abroad and ignorant of the whole transaction. It must, however, be observed, that there being in this case much besides, the Court only granted a rule for a new trial, thinking that the facts were not well ascertained, and

that some of the matters of law, which the case involved, required more deliberate consideration. It does not appear ever to have been afterwards brought under the notice of the Court, although the reported case has been again and again referred to, and particularly was urged on the Court as an authority, in *Lacy v. Woolcot*, 2 Dowl. & Ryl. 458, without effect, inasmuch as it did not bear directly upon the point then before the Court. Then the decisions of this Court, in *Dutton v. Morrison*, 17 Ves. 195, and *Re Waite*, 1 Jac. & Walk. 605, are relied upon as evincing a disposition to question the principles of the later cases at law, and as authorizing a different distribution of the partnership estate from that to which those cases would lead. But it must be observed, that Sir W. Grant, in *Brickwood v. Miller*, 3 Mer. 279, seems to have thought the principle carried too far in *Dutton v. Morrison*, as appears particularly from his observations in pages 281, 282; and at any rate all the cases, as well here as at *Nisi Prius* and in *Banc*, are reconciled, if not with each other, certainly with the opinion which I have formed upon the present question, by the distinction which may, if necessary, be taken, between acts binding the firm by way of contract,—making the firm liable, (as acceptances do immediately and in the first instance, and indorsements do after dishonour of the bill,) and acts which assume to pass the property, as delivery of goods, or indorsement of bills, which transferring the chose in action, passes the interest in these documents. For it is perfectly consistent with

the proposition, that the solvent partner cannot validly transfer the partnership property after the bankruptcy—to maintain that he may validly bind or make the firm liable by his acceptance given to a party ignorant of the bankruptcy. So it is no impeachment of the proposition, that by indorsing a bill payable to the firm, the solvent partner cannot pass that bill,—to hold that by the indorsement he can make the firm liable. This distinction plainly reconciles *Thomason v. Frere* with the judgment I am now giving, and it also reconciles it with *Lacy v. Woolcot*. For in *Thomason v. Frere* the bankrupts were the indorsers; and the bill, though drawn indeed by them, yet was an acceptance of a debtor to the firm; and the question was, whether this indorsement could operate, the assignment relating backwards and having vested the joint property in the assignees at the date of the act of bankruptcy. It was a question, not as to the liability of the firm, on the indorsement of the two partners, but as to the right of the holder of the bill, which it was contended was passed by that indorsement,—a right, not against the firm, but a right to the bill pretended to be passed by that indorsement. Now it is in nowise inconsistent with this position, or with the reason on which it rests, to hold that the bankrupts, and still more the solvent partners, might bind themselves and the firm to an innocent holder, either by passing their own acceptance, or indorsing another person's in favour of that holder.

Then let us consider the cases which bear

most immediately upon the point in question, and which have never been shaken. In *Fox v. Hanbury*, 2 Cowp. 445, Lord Mansfield held not only that if partners dissolve the partnership, they who deal with either, without notice of such dissolution, have a right against both (of which there could be no doubt); but further, that after a dissolution by bankruptcy, the partner out of possession of the partnership effects has the same lien on any new goods brought in which he had upon the old; and he held, and the Court decided, after full consideration, that the bonâ fide vendee of partnership property sold by the solvent partner after an act of bankruptcy committed by another partner, can hold that property against the assignees under a joint commission issued against both. To maintain the doctrine upon which my opinion in the present case is founded, there is no occasion to go so far as this; because the question here only relates to the liability of the partnership from the contract of the solvent partner, and not to the title given by him in the partnership property. But that the decision of the present case is involved in that determination, as the lesser is involved in the greater, and that the judgment under review cannot stand along with it, admits of no doubt. But the later case of *Lucy v. Woolcot* appears to have been before the Court below, and was cited before the learned judges there when the case first came on, but respecting which I find no mention either in the judgment or in the report, except a statement by the counsel endeavouring

to distinguish that case from the case at bar, and which case appears to have been treated as if it were of no authority, though it was a case most deliberately and solemnly adjudged and decided by the Court of King's Bench, who had not the least hesitation upon it. The late case of *Lacy v. Woolcot* is in truth a decision upon the very question in the present case; the only difference being, that there the bankrupt, and here the solvent partner, gave the acceptance; and that there it was given for a debt of the bankrupt, wholly unconnected with the partnership dealings, and here it was given for a partnership debt,—differences which, as far as they go, must clearly render that a stronger case than this, against the title of the holder. It is observable that the Court, in *Lacy v. Woolcot*, had the matter before it upon a special case; the point having been raised at the trial, and the matter put into this shape for the sake of a more solemn determination; that the Court had no doubt or hesitation upon the subject, stopping the counsel who were to have argued on one side; that *Thomason v. Frere* was cited as well as *Ramsbottom v. Lewis*, 1 Camp. 278, and the answer given by the Court so lately in that case proceeded exactly upon the distinction which I have taken; finally, that this decision has never been questioned, but, as I understand, has been acted upon at *Nisi Prius*; and certainly it is referred to as a recognized authority in a later case in the Court of Common Pleas, *Craven v. Edmondson*, in the 6th volume of Bingham, (p. 737.) So the distinction reconciles

the *Nisi Prius* cases of *Ramsbottom v. Lewis*, and *Abel v. Sutton*, 3 Esp. 108; for in each of these the question was touching the effect of the solvent partner's act, in transferring the partnership property, that is, the interest of the firm in bills of exchange after the bankruptcy of one partner. Next to *Lacy v. Woolcot*, *Harvey v. Crickett* is the most important case in every respect upon this question; for although the point which arises here was not expressly decided there, the principle of that case plainly governs this; indeed goes beyond the doctrine on which the present judgment rests; and the doctrine stated by the learned judges, who gave the subject much consideration, is altogether applicable to the question now before us. The difference, and the only difference, is this: here the solvent partner assumes to bind the firm by an acceptance in the partnership name, given to a creditor of the firm—there the solvent partner indorsed in his own name to the partnership creditor a bill drawn by a debtor to the firm, and made payable to the solvent partner. But the bill was drawn after the bankruptcy of the other partner: it was for a debt due to the partnership; and it was made payable to the solvent partner purposely, and upon the supposition that on the failure of the other every thing devolved to the one who remained. The case was therefore treated as one of a solvent partner disposing of partnership property, not of his assuming to bind the firm. But I can see no distinction in principle between the two cases, where the solvent

partner only assumes to bind the firm for value for a debt before existing, and gives a negotiable security for an antecedent liability of the firm—a liability contracted before the act of bankruptcy. The observation of Mr. Justice Bayley, that if the power of one solvent partner were to cease on the bankruptcy of another, the house must close at once, and that the right of the bankrupt passing to his assignees does not prevent the remaining partners from applying the partnership property in liquidation of the partnership debts; and the observation of Mr. Justice Abbott, that, if it did, a solvent partner might be ruined in the midst of abundance, while the creditors must wait till the assignees choose to distribute—are clearly applicable to the present question. Those observations, going beyond what it is necessary to go, are not quite reconcileable with some of the other cases; but upon the decision—the case itself—it cannot be doubted that the Court held the acts of the solvent partner binding on the firm; for he was permitted to transfer, by indorsement, a chose in action, a partnership credit, and to bind not merely his own undivided moiety of it, but also the moiety belonging to the bankrupt partner, that is, to that partner's assignees. Had he indorsed the name of the firm, and had the bill not been paid by the drawer and acceptor, could the Court, which decided in favour of his right to transfer the security, have denied that the holder of the bill had a right to go against the firm? Yet that would have been precisely this case. Then what is the difference between holding that the solvent

partner can pay a partnership debt by transferring a credit of the firm, and holding that he can pay the same debt, by giving a security which intitles the creditor, or his transferee, to go against the property—it may be the credits—of the firm? The cases cannot, upon any principle that I can descry, be distinguished. It must, however, be observed, that if, as is generally supposed, and as the arguments of the learned judges, particularly Mr. Justice Bayley, entitle us to believe, *Harvey v. Crickett* went the length I have been assuming, and held the transference of the property (there a chose in action) belonging to the firm, binding quoad the bankrupt's undivided share, as well as the solvent partner's, it goes a good deal further than is necessary to support the view I take of the present question. For although the solvent partner had only the power of binding his own share of the partnership property, he might still, upon the principles of that case, and upon the general grounds already stated, have the power of binding the firm by acceptances for partnership liabilities given to a holder without notice of the bankruptcy. *Harvey v. Crickett*, in the full extent to which it is said to go, is perhaps not quite reconcileable with some earlier cases, particularly those at *Nisi Prius*, to which I have already referred, *Abel v. Sutton*, and *Ramsbottom v. Lewis*. But its principles have never been shaken since; and I do not see how those principles, or the decision in *Lacy v. Woolcot*, can stand, if the present judgment of the Court of Review be right.

Upon the whole, whether I regard the general

principles which regulate the relations of partnership, or those of the bankrupt law, or the authority of decided cases when narrowly examined, I have no more doubt how the law upon this question stands, than I should have, upon principles of the highest expediency, how it ought to be, if we were now at liberty to enter upon such an inquiry. My decision is, that the petitioner has a right to prove; and the Court of Review ought not to have expunged his proof.

This decision, that the petitioner has a right to prove, and that the Court below ought not to have expunged his proof, only determines that the solvent partner can make the firm liable by his acceptance, passed to a holder ignorant of his co-partner's bankruptcy. It has no bearing upon the power of that partner to transfer the partnership property. The Court is not called upon to deal with that question, in deciding that the *bonâ fide* holder, ignorant of the bankruptcy, has a right to prove against the estate of the firm. As this is a question of very great importance, and as there is some conflict even in the language of some of the learned judges, and as the question appears not to have been so fully considered by the Court below, as its importance appears to me to demand, I thought it right to consult some of the judges of the highest authority, and particularly those who sat on the decision of some of the former cases at law, and they entertain just as little doubt on the question as I do.

NALDER *v.* HAWKINS.

THE Vice-Chancellor had refused, with costs, an application that the Master might inquire whether the further prosecution of this suit would be beneficial to the plaintiffs, who were infants; and if he should find in the affirmative, then that he might appoint a new next friend.

Sir E. Sugden and Mr. Hayter for the defendants. Mr. Pepys and Mr. J. Russell for the next friend.

LORD CHANCELLOR.—It is undeniable that the habit of the Court has been to encourage persons to come forward as next friends, for the purpose of obtaining its aid in behalf of parties incapacitated to sue themselves. The language of the books is frequently, that next friends should not be discouraged. But there are cases which go much further, both in their language and in their tendency; cases which, both by the words used and the things done, give great encouragement to undertake the office. In *Whittaker v. Marlar*, 1 Cox, 285, Lord Thurlow says, that “whoever will stand forward in that character is to be encouraged to every possible extent, while he can be supposed to intend the infant’s benefit.” This seems to go as far as possible; it is as much as to say, that any one may do what he pleases as next friend, until he does something which cannot by any possibility be supposed to be done *bonâ fide* for the infant’s advantage. It must, however, be observed, that this is rather the language of the

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Principle that should govern cases in which the motives of persons instituting suits as next friends of infants are questioned.

case than the point decided ; for there the Court, on a full review of the circumstances, dismissed the bill, and made the next friend pay the whole costs of that proceeding, and of the application ; but it had been referred to the Master to inquire whether or not the suit was necessary, and he had reported against it ; and the book does not state the facts upon which the report and the decision are grounded. The encouragement has been extended still further in later cases. Lord Thurlow, in the one cited, held that no degree of mistake or misapprehension would entitle the Court to fix a next friend with costs. In *Davenport v. Davenport*, 1 Sim. & Stu. 101, the Court refused to inquire into the circumstances of a party proposed as next friend, on the ground that after one was removed another might file a bill as of right without any inquiry. Nevertheless, it is clear that the Court always expects a next friend to be a person of substance, and so it was said by Sir J. Jekyll, in a case at the Rolls, 1739, 1 Atk. 570, (*Anon.*) ; and if such is the expectation, that is, the just expectation of the Court, it might never be fulfilled were no steps competent to be taken for the purpose of ensuring its accomplishment. Yet the language of the report of a late case, *Pennington v. Alvin*, 1 Sim. & Stu. 265, would even give room to suppose, that if a person notoriously pennyless, who had seduced the infant's mother, been for months in execution on the suit of the husband and father for adultery, and taken the benefit of the Insolvent Act, had come forward as next friend of the infant, and not of the mother, the

Court would hardly have made him find security for costs.

The true and the just principle which should govern all such cases, is this : No discouragement ought to be thrown in the way of persons *bonâ fide* suing as next friends ; but no undue facility should be given to mere volunteers who interfere rather for their own purposes than for the infant's advantage. While they appear to act *bonâ fide* they will be protected ; the presumption will rather be in their favour ; the proof will rather be thrown upon those who impeach their motives ; the leaning will be more for than against them. But no strained presumptions will be made to protect them ; no forced constructions will be put on their conduct to favour them ; no benefit from bare possibilities will be conjured up for them. They must be content to have their motives appreciated, and their acts judged like other parties. If they have involved themselves in suspicions, their proceedings must be subjected to inquiry ; if they have incurred just blame, be it by improper interference, or be it by unnecessary interference, they must abide the consequences ; the suit at their instance must be stayed ; or if the suit be useful to the infant, but the parties instituting it be unfit to conduct it, they must give place to others in whom the Court can better repose confidence. It follows that every such case must depend upon its circumstances ; nor will the Court even order an inquiry, unless just cause of suspicion exists.

In the present case, the circumstances are of a very peculiar aspect. This is not the suit of Browne, the nominal next friend, any more than it is mine. It is the suit of Mr. Tilby, an attorney. I do not for that reason either blame Mr. Tilby, or decide that the suit is needless, or even deny that it may be beneficial; but I state this as a thing calculated to point the particular attention of the Court towards the whole other circumstances of the case. These are such as to excite very watchful attention; they give birth to suspicion enough to call for full inquiry; and I feel that I should not discharge my duty in protecting the interests of these infants, if I did not send the whole matter to the master. But I shall direct the inquiry to be not only as to the suit being for the benefit of the infants; but, if it be, as to the proper person to conduct it in case the present next friend be removed. The master must consequently also inquire whether Browne is a fit and proper person to be continued the next friend; and he is to have leave to report special matters.

JENKINS *v.* PARKINSON.

THE judgment narrates all the facts.

For the plaintiffs Sir E. Sugden and Mr. Stuart. For the defendant Mr. Pepys and Mr. Crombie.

LORD CHANCELLOR.—Jenkins, being lessee of certain premises at Lisson Grove, under Mr. Portman, by an indenture of July 4, 1812, leased a portion of the same to Dr. Cockburn, and covenanted that he would not during the term erect, or suffer to be erected, any buildings whatsoever on that part of the land lying eastward of the property thereby demised, under the penalty of 5000*l.* to be paid to Dr. Cockburn. On the 3rd of August, 1825, Jenkins agreed to demise to Parkinson all that part of the premises comprised in Mr. Portman's lease, which was not included in the lease to Dr. Cockburn, subject to a covenant, to be entered into by Parkinson for indemnifying Jenkins against any breach of the covenant in the lease to Dr. Cockburn. Parkinson entered into possession under the lease, and caused some houses to be built on the land referred to in the covenant, whereupon Dr. Cockburn brought his action against Jenkins; and the same being defended by Parkinson, the latter suffered a verdict to be taken for 5000*l.*, subject to a reference, whereby the damages were afterwards reduced to 1500*l.*, and the amount of the

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An action having been brought upon an agreement, in which was a stipulation to indemnify against the breach of a covenant in a lease, and a verdict recovered at law, but the plaintiff having died before judgment was perfected, and a suit having been instituted by his executors for the specific performance of the agreement, they obtained therein a writ of *ne exeat regno* marked in the amount of the verdict. Such writ was now discharged.

The Court has in general no jurisdiction to give damages for the non-performance of an agreement.

costs was fixed. Jenkins was subsequently obliged to pay the 1500*l.*, and not being able to obtain it from Parkinson, he brought his action against Parkinson, and obtained a verdict for 1500*l.* as damages, and also for a certain sum as costs, subject, however, to taxation. Jenkins shortly after died, and the costs in the last action not having been taxed, owing, as it is now said, to Parkinson's attorney keeping back the papers, and the judgment not being perfected, the representatives of Jenkins have not been able to avail themselves of the verdict in his favour, and they have therefore filed this bill against Parkinson, praying a specific performance of the agreement of the 3d August, 1825, and that in the meantime, and until the same shall be decreed, a writ of *ne exeat regno* marked with the sum of 1500*l.* may issue, and such writ having been granted, it is now sought that it may be discharged, on the ground of the question being a question at law, and that, contrary to the allegation in the bill, the judgment might have been perfected in Jenkins's life.

The bill has plainly for its object to obtain the costs of Jenkins's action against Parkinson, which costs are otherwise likely to be lost. The plaintiffs have by the death of Jenkins lost the benefit of his verdict; and though a new action may be brought at law upon the covenant of indemnity, and though in that they will be enabled to recover the sum of 1500*l.*, paid by the testator on Dr. Cockburn's action against him, with the costs of that action, they will not be able to

recover the costs of the action brought by the testator against Parkinson, and in which the judgment was not perfected. It is in vain then that it is attempted to be concealed that it is for the recovery of those costs that this bill has been filed. Whether or not the Court of King's Bench would allow the executors to enter up judgment *nunc pro tunc* on Jenkins's verdict, if they could prove that the delay and loss of the judgment were occasioned, as is alleged, by Parkinson's attorney wilfully keeping back the papers, and obstructing the taxation of costs, is another question, though I incline to think no such relief could be given to them, and that therefore the costs of the testator's action are gone.

But have the executors a right on that account to come here, and having—whether by their testator's laches, or through the conduct of his adversary's attorney, signifies not—lost the fruits or part of the fruits of his verdict, therefore to call upon this Court to treat their claim as equitable, and give them relief? It may suffice to say, that this is not what they pray by their bill. Their bill prays no compensation, but it sets forth the agreement with Parkinson, whereby he undertook to build upon the demised premises, and to save the testator harmless against the breach of the covenant in the lease to Dr. Cockburn which such building might occasion, and it prays a specific performance of this agreement. To what would that performance amount? It would amount only to the compelling of Parkinson to build, and also to save harmless the representatives of Jenkins ;

in other words, to perform the intended covenants. The Court will compel him to execute a lease with covenants, which he had agreed to enter into, but not to do the thing which those covenants would bind him at law to do, under pain of being sued for the breach. But even if the Court could compel him to do the thing to be covenanted, there is no agreement for a covenant to pay that which has been lost by the testator's death, namely, the costs of his action against Parkinson. If there were any such agreement, the executors would not be remediless at law ; they could proceed for those costs, as well as for the 1500*l.* paid by Jenkins.


But suppose the bill had, as has sometimes been attempted, distinctly prayed, assuming there could be no performance, compensation for non-performance, or had prayed compensation for the breach, under the agreement of indemnity, it would then have asked such damages to be ascertained by an issue, or by a reference to the master, as was done in *Denton v. Stuart*, (see 17 Ves. 276 n.) and *Greenaway v. Adams*, 12 Ves. 395. The plaintiffs cannot be in a better position than if their bill had taken that form ; for unless the damages—or the compensation, as they would call it, to give it a less legal and a more equitable aspect—can be so ascertained, the relief cannot be awarded. In *Todd v. Gee*, 17 Ves. 273, the question was raised, whether a party was entitled to satisfaction, by way of damages, for the non-performance of an agreement, to compel the execution of which the suit was instituted ; and Lord Eldon held that,

unless in very particular circumstances, he was not. He did not in express terms overrule *Denton v. Stuart*, but he did every thing short of denying it to be law; and it was strongly represented at the bar to be a decision made under the pressure of strong claims of justice, but which should have been forgotten as soon as it was pronounced. In *Greenaway v. Adams*, it was admitted to be the solitary authority for the point; and though it was there followed, because the Master of the Rolls said he would not overrule what Lord Kenyon had decided, yet he most reluctantly adopted it; and in a subsequent case, *Gwillim v. Stone*, 14 Ves. 128, expressing the great doubts he had felt of its authority in *Greenaway v. Adams*, he refused to follow it a second time. The opposite current of all the previous authority, to which Lord Eldon refers in *Todd v. Gee*, may therefore be considered as restored after a temporary and dubious interruption, and it may be concluded that those two cases (*Denton v. Stuart* and *Greenaway v. Adams*) are no longer law. But even if they were, and if this Court, entertaining such a suit, could refer it to the master to ascertain the compensation due for the non-performance of an agreement, it by no means follows that a *ne exeat* should issue on the filing of the bill. For what sum is the verdict in such a case to be marked? This question occurs in the outset, and, as was said by Lord Thurlow in a similar case of unliquidated damages, *Coglar v. Coglar*, 1 Ves. jun. 94, the impossibility of answering it in any way but one—that the sum must be left to the discretion of the Court—seems

to be an insurmountable objection. Nor will it do to say that 1500*l.* was found due by a jury. It was found due by way of damages ; and the Court, if it has jurisdiction at all, must begin the inquiry as if the matter were fresh ; it must satisfy itself in the usual way, and cannot assume that the compensation awarded before was the just measure of the injury sustained.

But is it necessary to decide, in this stage of the proceeding, whether or not the relief sought is within the province of this Court ? If it be not, *cadit questio*. But though it be, has the party a right to the writ he has obtained, his title to equitable relief being, to say the least, incumbered with doubt ? I hold that where the equity is clear, though the facts may be in dispute, the allegation of the debt on oath, or the swearing to belief of a balance due, may entitle the party to his writ, in order that he may hold the debtor to bail ; but that where the equity is matter of grave doubt, however specific his allegation of debt may be, he shall not, generally speaking, have his writ. At least, I am not aware of a *ne exeat* having been issued under any such serious doubts of the equitable jurisdiction.

But there is here a consideration which disposes of the case at once. It is not denied that the party has his remedy at law. The verdict obtained is gone ; gone, it may be, by the laches of the plaintiff in the suit, or, it may be, by the alleged contrivance of the defendant's attorney ; although it should be observed, in passing, that no such contrivance could have eluded the justice of the Court



of King's Bench for six hours, had the plaintiff used due diligence. However, be the fault whose it may, the verdict is gone, and the plaintiff's executors cannot use it. Therefore, they may bring an action again; and whether they can hold the defendant to bail or not is immaterial, though it is not said why they cannot; if he has already been arrested, that of itself is a conclusive answer to the application for a *ne exeat*; if not, no reason is given why he may not be arrested now in a new suit. But the writ is strictly confined to cases where the party has no remedy at law, unless in the excepted cases of a decree obtained for alimony, and of a balance sworn to upon an account. All the cases are against stretching this exception. In *Raynes v. Wyse*, 2 Mer. 472, Lord Eldon plainly considered that he could not grant the writ on allegation of a sum due on an agreement, the performance of which was resisted, although he decided upon another point,—the previous holding to bail at law. In *Ex parte Duncombe*, 2 Dick. 503, the demand being legal, though there was an obstacle in the way of suing at law, the writ was refused: So it was in *Gardner's case*, 15 Ves. 444, where the demand was legal, but the party could not be held to bail. In *Blaydes v. Calvert*, 2 Jac. & Walk. 211, Lord Eldon refused it after full consideration, where the suit was for performance of an agreement to give security for a third person's debt, by way of acceptance, for a given sum. It was there, as here, suggested that the party could not be held to bail at law; but Lord E. said that was no matter for his consideration. It is needless to go through

the other cases, which are more familiar; but two valuable notes of Lord Eldon's remarks on the subject—one in *Pares's* case in 1801, communicated by Mr. Bell, the other in *Butler v. Dorant*, in 1809, communicated by Mr. Cooke,—are to be found in the last edition of Mr. Beames' book, on the writ of ne exeat regno, pages 47 and 52; and they show the clear opinion of that most learned Judge to be against issuing the writ in circumstances much more favourable, and much more akin to the ordinary case, than those alleged upon the present occasion.

The order obtained in this suit for a ne exeat must therefore be discharged. But considering the length of time that the defendant has delayed making this application, and the great hardship of the plaintiff's case, who must needs lose their costs at law of the second action, I shall direct the costs of the motion to be costs in the cause.

BLACKWELL v. TATLOW.

A WRIT of attachment was directed to the sheriff of Derbyshire against Blackwell, for non-payment of some costs, amounting to 13*l.* 14*s.* 11*d.*; to which writ a special return was made, whereby it appeared that the sheriff had made his mandate to the bailiff of the liberty in which Blackwell resided, and that Blackwell had been captured, but was presently rescued, under such circumstances as are alluded to in the judgment, and that the bailiff had not since been able to find him. Upon this return, an order was made (without any affidavit in support), by which, after reciting the issuing of the attachment, and also such return, ver-

batim, the Serjeant-at-arms was empowered to take Blackwell into custody and bring him to the bar of the Court to answer his "said contempt;" and the Serjeant-at-arms having succeeded in doing this, there was a further order, which, after reciting the bringing of Blackwell to the bar of the Court for failing to satisfy the above sum, turned him over to the prison of the Fleet, there to remain until the sum should be discharged and his contempt cleared;—and shortly afterwards a third order was pronounced for issuing a sequestration against Blackwell;—and this last order recited both the order for the Serjeant-at-arms, and the order for turning over to the Fleet.

Mr. Pepys and Mr. J. Russell moved to discharge all the above-mentioned orders. Their motion was opposed by Sir E. Sugden.

LORD CHANCELLOR.—Although in this case much attention was given to the form of the proceeding, when the order was made for the Serjeant-at-arms, yet the great importance of all questions affecting the liberty of the subject has called for a full reconsideration of the matter upon the motion for discharging that order, and the two subsequent orders of the Vice-Chancellor, supported as that motion was with great learning and ability.

The order for the Serjeant-at-arms begins with stating the issuing of an attachment for not paying the sum of 133*l.* odd, pursuant to the order of the Court, and report of the master; it then sets forth the sheriff of Derbyshire's return, which consists of a mandavi ballivo and the bailiff's return; the sheriff stating that the bailiff has the exclusive return of writs within the liberty of Scarsdale, in his bailiwick. The bailiff's return is, that he made a caption of the plaintiff within the franchise, and

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An order for the Serjeant-at-arms upon a return of a caption upon an attachment and a rescue is regular, although not founded upon an affidavit.

on a day and at an hour stated; but that he was rescued by force, accompanied with much indecent violence, and in circumstances amounting to a high and even aggravated contempt of the process of this Court and its officers. It adds, that the party so rescued made his escape, and that the bailiff could not find him so as to execute the attachment. Upon hearing this return, the order is made, commanding the Serjeant-at-arms to take the party into custody and bring him to the bar, to answer his "said contempt."

The first question that arises is—what shall be intended by his "said contempt?" And although the first contempt, in not paying, is certainly recited in the outset of the order, yet I incline to think that the other, or incidental contempt of the rescue, must be understood as meant. It is the last antecedent; it is very minutely described; and moreover, if the warrant were not issued for that, a flagrant insult would be offered to the process of the Court, without any means of vindicating it, unless by a new caption. For, suppose the party only taken upon the original contempt, and in custody for no other offence, he might clear that by payment of the money, and must then be discharged in order to be taken again by a new warrant;—whereas, if he is taken for the second contempt—the rescue—there being a process out for the first contempt, he may be visited for both one and the other on the same custody. It may be observed that there is no contempt stated in terms either in reciting the attachment or the rescue; so that it is by the legal effect

only of the matters set forth in both that we obtain the antecedent referred to. But that is quite sufficient ; and I only mention the mode of recital to show that it is common to both.

As for the return being in substance a non est inventus, I place the less reliance upon this, because, although there are precedents for the Serjeant-at-arms going upon such a return, and I have been furnished with one in *Royal Exchange Assurance Company v. Hill*, February, 1761, yet that is not the common practice ; and accordingly the counsel for the plaintiff rely on this circumstance as aiding the construction they put on the order, and to which I incline, that it was grounded upon the rescue.

I wish therefore to consider the regularity of the process on the assumption of the plaintiff's counsel, and to meet and dispose of the question raised, Whether or not such process is well issued upon a return strictly regular, in all respects, of a caption and a rescue, but without any affidavit of those facts? My clear opinion is, that the process was well issued upon the return ; and that this conclusion, while it is supported by principle and by analogy, is inconsistent with no authority, violates no rule of the Court, and avoids consequences highly inconvenient, and even dangerous to the practice of the Court, without occasioning any mischief whatever to any party.

As a general principle, there can be no doubt that for contempts of this nature, consisting in violence towards the officer, or insults towards

the process of the Court, persons can only be arrested and brought before it upon affidavit of the facts charged. By Lord Bacon's seventy-seventh Order, contempts of such kind, there described as "contempts of force, or ill words, upon serving of process," are to be dealt with summarily as to commitment; but it is expressly assumed that they must be proved by affidavit. And, in Lord Clarendon's Orders upon "Commitment," (copied, as so many wholesome provisions were, from those made a few years before during the Commonwealth), the oath of one or more persons is taken for granted as the foundation of the process, and in such a manner as to have raised a doubt whether, for a commitment on motion, two witnesses be not necessary. This doubt is supported by a case in the 3d vol. of Atkyns, (*Anon.* p. 219), where the registrar states, that for words contemptuous of the process two witnesses are required, though for a battery one may suffice; and Lord Hardwicke doubted the distinction. I take leave to think that this cannot now be considered as law; and that the oath of a single witness is sufficient here as in any other case. But those orders, and the language in that and the other cases, as *Ex parte Clarke*, in 1 Russ. & Myl. 563, plainly show that commitments, without any oath, never were contemplated.

The general rule, therefore, is unquestionable, that there must be an oath to verify the facts before the commitment can take place. But to this there is one well-known exception,

where there is evidence higher than any testimony, the contempt being committed in face of the Court, and so known to itself. Here it would be absurd to require any affidavit. So a magistrate may commit for breach of the peace in his presence, but if such breach is complained of as having occurred elsewhere, he must proceed upon oath.

I think that the present case affords another exception, both upon principle and upon the practice of the courts of law; although it has never been the subject of judicial decision in this place. We have a return by the sheriff,—the subordinate return to him from the bailiff of the liberty within his bailiwick being incorporated by him in his return, and being indeed itself the return of an officer who is quasi sheriff of the liberty. That return is of a caption and rescue; the caption being made in the regular execution of the process of the Court. The return is regular in every respect; it states the caption, and it states the rescue in terms; adding many circumstances of great aggravation. The authorities, to some of which I shall presently refer, all show the regularity of this return. It is necessary to give credit to such return, if formally and solemnly made, otherwise the issuing of one process would only be the prelude to issuing another, grounded upon the same kind of evidence. The Court does not, indeed, proceed without ground; it does not attach upon a statement or a suggestion that its process has been contemned, and its officer obstructed, any more than it attaches upon a sug-

gestion, that there has been a default in obeying any of its orders. It is agreed that there must be something to show that the contempt has been committed: the only question is, whether or not an affidavit is necessary, and whether the return is not sufficient; and I think it would be of dangerous consequence to the process of the Court if it were held insufficient. As for the risk or inconvenience to the party, it is now admitted that the proceeding is *ex parte*; and that, though an affidavit were required, he could have no notice, nor any opportunity of answering it. His security, therefore, cannot be said to be materially lessened, by substituting in this *ex parte* proceeding the return of the sheriff, for the affidavit of the officer or other person to the facts returned.

The Courts of Common Law have always treated a return of a rescue as equivalent to a conviction. It was so considered in *Rex v. Pember*, K. B. Cases temp. Hardwicke, 112, after an inquiry as to the practice in the crown office; the result of which was, that process issues from that office immediately upon such a return, as on a conviction. It was so considered in *Rex v. Elkins*, 4 Burr. 2129, where the only doubt expressed was upon the old practice, cited from a case in Salkeld, (*Anon.* vol. 2, p. 586,) of fining in the same sum all the persons returned as rescuing. That case, and another in *Strange*, (*Streather v. Holt*, vol. 1, p. 531,) as well as the whole head of "Rescous," (D. 4, 5 & 6,) in Comyn's Digest, clearly show that such returns are conclusive, and cannot be traversed.

Consult also *Lady Russell* and *Wood's* case, Cro. Eliz. 781, and article "Return," 2 Rolle's Abridgment, 456. By the case in *Salkeld*, it appears that affidavit of rescue, in the Court of King's Bench at least, is held of no avail—it must be returned.

It would be a singular anomaly if that return, which is of such high avail on the one side of the hall, as to have the full force of a record of conviction, and lead to instant execution, were here to have no weight at all. But I am not called on to say whether or not the return made is traversable. It is used only as the ground of arrest, and the means of bringing the party before the Court to answer the charge: it is not treated as a final adjudication, but in every respect as mesne process. The party is brought before the Court accordingly; and he has then an opportunity of answering and of defending himself. Nor do I say that he may not, even after he has been turned over, be aided or released upon application to the Court. At law the punishment is at once ordered, and, it may be, a fine imposed, which is conclusive; and the only remedy of the party is by action for a false return. Here, in one sense, the proceeding may be termed remediless, inasmuch as the arrest is irrevocable. But the party has the same right to apply for his discharge, and to show that he was not guilty of the contempt, as he would have, if committed upon affidavit. Moreover, he has the same kind of redress against those through whose misrepresentations he has been committed; for the Court will, on cause shown, refer it to the master to inquire how far he has been injured. It is not therefore

contended that the return is binding upon the Court, as at law, and that it amounts to a judgment upon which execution must instantly follow, but only that it entitles the Court to bring the party before it, and put him upon his defence. Instead of giving the return the greatest force known in the law—that of the record of a final judgment—I only give it the least force—that of the foundation of mesne process. Nor do I say that any return of a contempt not amounting to rescue would have even this force. Unless a caption and rescue were actually returned, the case would not be brought within the authorities at law. A return of such contempt as rendered it impossible to execute the process, may come within the same principle. But whether or not that would be sufficient, without affidavit, I am not called upon in this case to decide. Upon principle I can see no difference; but there is no authority to warrant me in so extending the rule. All other contempts of the process of the Court, however gross, must, upon the authority of the rules and of the cases in this Court, be dealt with by evidence upon oath, that is, by affidavit.

A little consideration will at once show, that there is nothing in the judgment I am now giving inconsistent with the authorities to which I referred in the outset, whether of the orders or of the decisions. None of these contemplate the case of a rescue returned by the sheriff, or, indeed, of any contempt returned at all. Lord Bacon's seventy-seventh Order plainly supposes the only evidence before the Court to be an affidavit of a contempt towards the process of the Court, and makes no

provision for the case of that contempt appearing on the face of the return. Moreover, it makes the commitment proceed "forthwith" upon such affidavit, whereas in other contempts, as disobedience of decrees, &c. the affidavit only entitles the Court to attach for the purpose of examining the party touching his offence. The force which I am now attributing to a return of the former and worse sort of contempt, is no greater than the order gives to an affidavit in the latter and lighter kind; and much less than the order gives to an affidavit in the worse kind. The like observation is applicable to Lord Clarendon's Orders, touching Commitment. In the *Anonymous* case in 3 Atk., and in *Ex parte Clarke*, there was no return at all, and nothing is there said as to the effect of a return. Nor must it be forgotten that in the latter case the order for commitment was upon affidavit made, and absolute in the first instance, without hearing the party. Surely, then, it is not at all inconsistent with this, to hold that a regular return of a contempt justifies the Court, not in committing absolutely without hearing, but in bringing the party before it to answer the allegation.

If, therefore, the warrant was well issued to the Serjeant-at-arms, and the party was in lawful custody when brought up to answer for his contempt, there is no dispute of the legality of his commitment for that contempt. He was then, by an order of the Vice Chancellor, turned over to the Warden of the Fleet, and thereupon, by another order of his Honor, sequestration was awarded. Both of those orders, it is said, purport to proceed

upon his being in custody for the original contempt, in not paying money ; whereas he was in custody for the incidental contempt which followed, namely, the rescue. But, it is by no means correct to say, that he was not in custody for the original contempt also. Assuming the warrant to the Serjeant-at-arms to have been issued for the rescue, still, when thereby he came into the lawful custody of the Court, it is certain that he could not be discharged without clearing his original contempt. He was, strictly speaking, in custody for both ; because I hold it to be undeniable that the original contempt continuing uncleared, and the execution of the warrant to take him for that contempt having been obstructed by him, the caption made on the second warrant shall enure to hold him for the contempt on which the first issued ; and the custody for the second offence shall extend to the first.

But it is not stated in either of the Vice Chancellor's orders, that the party was in custody for his original contempt of not paying the money. The order for turning him over to the Fleet merely recites, that he is brought up to the bar of the Court by the Serjeant-at-arms, for not paying the money, which is perfectly correct ; for whatever was the ground of the caption, he might be brought to the bar for not paying the money. Suppose he had suffered imprisonment for a certain time in respect of the rescue, before being discharged he would be obliged to clear his original contempt ; and upon an order being made to discharge him for the rescue, as having been sufficiently punished for

that offence, he would, as of course, be liable to be brought up for the other contempt, and must clear it also before obtaining his liberation. Again, the order of sequestration states, that the Serjeant-at-arms had been commanded to take him, and to bring him to answer for his contempt in not paying the money; but it adds, that by another order he was turned over to the Fleet till he should clear the original contempt; and this is quite sufficient ground for the sequestration, whatever may have been the warrant upon which he came into the custody of the Court. Therefore, neither of these orders of the Vice Chancellor proceeds upon the ground that he was in custody for the original contempt; although, if they had, it by no means appears incorrect to say, that being taken for the second contempt, he was in custody for both.

In any view, therefore, which can be taken of these orders, and of the whole case, I am clearly of opinion that the process is unimpeachable. That by which the serjeant made the caption is in all respects strictly correct; and that by which he was turned over to the Fleet, and then his property sequestrated, is not vitiated by the reference made in his Honor's orders to the original contempt. It is needless to add, that unless the construction set up by the plaintiff's counsel is put upon the warrant to the Serjeant-at-arms, namely, that by "said contempt" is to be intended the rescue, no question whatever can be raised upon the strict correctness of these orders of the Vice Chancellor. We have been considering their regularity upon the assumption

to which I incline, that such is the true construction of the warrant.

The motion must be refused with costs.

HOME v. PILLANS.

THIS was an appeal from a decree at the Rolls, upon two passages in a will, which are incorporated in the judgment.

For the appellants, Sir E. Sugden and Mr. Moore. For the respondents, Mr. Kindersley and Mr. Soltau.

Nov. 25, 1833.

Legacies bequeathed to A. and B., when and if they should attain twenty-one, to their separate use, and in case of their or either of their deaths leaving children or a child, the shares or share of them or her so dying bequeathed unto their or her respective children or child. Such legacies held to be vested absolutely in A. and B. upon their attaining twenty-one.

General remark upon the rules of construction adopted by the Courts.

Rule that a bequest to any person, and in case of his death to another, with no reference to the period within which that event

is to take place, vests absolutely if such person survive the testator.

LORD CHANCELLOR:—The question here is upon the construction of a legacy given by the testator to his two nieces, in these words:—"I give and bequeath to my nieces Catherine and Mary, the sisters of David and John Home, the sum of 2000*l.* sterling each, when and if they should attain their ages of twenty-one years, and which said legacies to my said two nieces I give to them for their and each of their own sole and separate use, free from the debts or control of their or either of their husbands; and in case of the death of my said nieces or either of them leaving children or a child, I give and bequeath the share or shares of such of my said nieces or niece so dying unto their or her respective children or child." The residue is given to Mr. Macpherson, when and if he should attain the age of twenty-one. The will then proceeds in these words: "and in case of his death under that age, then to my said nephews David

and John Home and to my said nieces Catherine and Mary Home, in equal shares and proportions; the shares of my said nieces to be enjoyed by them respectively for their respective lives for their own sole and separate use, free from the debts or control of their respective husbands, and on their death the share of each of them to go to their respective children; the children of each to take the share of their respective parents equally." Upon these clauses, or rather upon the first, the question arises; for I do not think that the structure of the residuary clause throws any material light upon the other. It is true that the testator there shows that he can describe the contingency of a dying under age in apt terms, when he is minded so to do; and hence an inference is drawn in favour of the Master of the Rolls' construction of the first clause. But it is also true, that the other part of the residuary clause gives a most accurate description of a life interest and a remainder limited upon the determination of such interest; from whence it may be argued, that had the testator intended to restrict his nieces to a life interest in their legacies, he would not have left his meaning doubtful. And although the construction put by the Court below upon the first clause does not suppose the gift of a life interest, but an absolute gift defeasible on the death of the legatee leaving children living, yet it may fairly enough be said that the reversionary interest of those children would have been otherwise provided for by the testator who framed the residuary clause, had he meant them to take in succession after their

parents. We may therefore dismiss the residuary clause, as not making more for the one side of the argument than for the other.

I have considered this bequest with great care, and as the conclusion to which I have come differs from that of his Honor the Master of the Rolls, I shall state the grounds upon which I have formed my opinion ; premising, that I should feel much more distrust of that opinion, were I not entirely convinced that it is in accordance with the whole current of decisions ; that, with perhaps a single exception, it is not contradicted by any authority which is irreconcilable ; and that upon a full and deliberate view of all the cases I am driven to elect between reversing the judgment of the Court below and abiding by the decisions, or affirming it, and overruling most of the cases in substance, and some of them in terms.

Questions of this kind rest more upon precedent than principle. The decisions of the Courts have adopted certain rules of construction, and given a certain sense to particular expressions. It may be said, upon the whole, that they have generally chosen the sense most natural, and assumed the intention most likely to have been in the mind of the party. But had they adopted another view, they would not have done any very great violence to nature and probability ; so that we are very much inquiring into the application of an arbitrary or technical rule.

Now there can be no question that a bequest to any person, and in case of his death to another, is an absolute gift to the first legatee, if he survives

the testator; and this, whatever be the form of expression, as, “if he die,”—“should he happen to die,”—“in case death should happen to him,” and so forth. The event here contemplated being so universally inevitable to all men, that it cannot be deemed a contingency, the Courts have held that something else must be intended than merely to provide for the case of the legatee dying at some time or other, and have said that they will rather suppose the testator to have contemplated and provided for the case of the legatee pre-deceasing himself, and so have read those words as if they had been “in case of his death during the testator’s lifetime,” in which event alone they have allowed the bequest over to take effect. The inconsistency of treating as a contingency the event of all others the most certain, is not the only consideration which has swayed the Courts in seeking for qualifications to restrict the generality of such clauses. The leaning in favour of vesting, and against a construction which would postpone the absolute enjoyment, and indeed keep in doubt and hold in suspense the nature of the interest bestowed, has here, as in other branches of the law, operated powerfully in the same direction. To cite the instances in which the fundamental position I have referred to has been laid down, or recognized and acted upon, would be to go through almost all the cases upon such bequests from the one in *Strange* (*Lowfield v. Stoneham*, vol. 2, p. 1261,) downwards. But there is a series of decisions by Sir W. Grant, in which he constantly adhered to the doctrine, commented upon the

other cases, and reconciled some that were apparently, and but apparently, at variance with it, which may be consulted with great advantage, as bringing the whole matter within a convenient compass. I allude to *Turner v. Moor*, 6 Ves. 557; *Cambridge v. Rous*, 8 Ves. 12; *Webster v. Hale*, Ibid. 410; *Ommaney v. Bevan*, 18 Ves. 291, and more particularly the second of these, *Cambridge v. Rous*. It was a bequest to two sisters, and each gift was coupled with the proviso, that in case of her death the legacy should devolve to the other surviving. Both gifts were held clearly to vest absolutely on the legatees respectively surviving the testator. But I cite this luminous judgment as much for the powerful view which it takes of the other cases, as for the decision which it promulgates. That no difference whatever is made by the circumstance of the legatees over being the children of the first taker, is equally beyond all dispute. Indeed this was the case in *Turner v. Moor*, the first of the authorities to which I have referred; and in several other recent ones, particularly *Slade v. Milner*, 4 Madd. 144, decided by his Honor the Master of the Rolls.

But although the Courts have resorted to the lifetime of the testator in the absence of any other period by reference to which the generality may be restricted, it must be admitted that this period has always been adopted with some reluctance, and has been felt to be a supposition which, if not violent, was yet somewhat strong; inasmuch as the maker of a will does not naturally provide for the event of surviving his legatees, the selected

objects of his posthumous arrangements. Such a construction has accordingly been termed “unnatural” by one Chancellor (Lord Thurlow), and another (Lord Hardwicke) has traced the origin of the term “lapse” to the supposition that the possibility of the event escaped the observation of the testator. *Ulrich v. Litchfield*, 2 Atk. 372. It is to avoid a greater inconsistency—to escape from a construction more closely bordering upon violence, that this supposition has been resorted to, from whence two remarks arise; first, that some of the cases have been affected by the reluctance to adopt it, where other peculiar circumstances made the opposite hypothesis of “death whensoever,” less strained than usual; and, secondly, that where the context gives another period with which the clause can be connected, it is to be preferred for the purpose of introducing the restriction wanted. Both these remarks will be found to bear upon the consideration of the present question. If there is a bequest to one for life, and after his decease to A., and in case of A.’s death, to his child or children, or to B., the contingency is held referable to the lifetime of the first legatee; and the bequest over only takes effect in case A. dies during the continuance of the life estate; but he takes absolutely if he survives the tenant for life. This was precisely the case in *Hervey v. M’Laughlin*, in the Exchequer, 1 Price, 264; and in *Galland v. Leonard*, at the Rolls, 1 Swanst. 161. The latter was shortly this: a bequest to the widow for her life, and on her death the monies to be divided between the two daughters; and in case of the death

of them, or either of them, leaving a child or children, to that child or those children. The daughters were held to take an absolute interest on surviving the widow; that is, the clause was read "in case of their death during the lifetime of the first taker." It is hardly necessary to remark how close this case comes to the one at bar; indeed they cannot be distinguished as far as the clause goes, for in both the possibility contemplated is the same—the legatee's death leaving a child or children; and that, though somewhat less vague than the clause "in case of death" generally, is yet held to describe an event too ill defined, and therefore receives the restriction of the first taker's life, in order to advance the period of vesting, and to terminate the interval of suspense during which it must remain uncertain what amount of interest the legatee takes.

It may thus be stated as a general proposition, that where the bequest over is in case of the legatee's death, and no other reference can be made, the period taken is the life of the testator; but where another reference can be found, that will be preferred, to avoid the supposition of the testator having contemplated and provided against a lapse. A preceding gift for life or other interest less than the absolute property will furnish this reference. But this is not the only means of restricting the generality; and a direction that the gift shall vest at a given time, affords just as easy and as natural a reference as a preceding life interest. Thus a bequest to A., and in case of his death to B., is a gift absolute to A. unless he dies in the testator's

life. A bequest to C. for life, and then to A., and in case of his death to B., is a gift absolute to A., unless he dies during C.'s life. A bequest to A. when and if he attain the age of twenty-one, and in case of his death to B., is a gift absolute to A., unless he dies under age. It appears impossible to doubt that such is the natural and obvious reading of the words in all these cases, if there were no general principles governing the legal presumptions connected with the subject, and no authority of decided cases imposing a sense upon the expressions.

The decisions to which I have referred are upon the subject immediately before us. But a similar view of the matter pervades many of the cases upon an analogous point—the time to which words of survivorship among tenants in common of a legacy shall be taken to relate—whether to the testator's decease, or to the distribution of the fund, or to some other time. And although upon this subject the series of cases is much less unbroken, and there are some not to be reconciled with others, yet it may be observed that the leaning towards adopting a definite period, in order to advance the time when the interest should become determinate, led the Judges to take the testator's death, where no other could be found, except the period of distribution; as in *Bindon v. Suffolk*, 1 P. Will. 96; *Maberly v. Strode*, 3 Ves. 450; *Perry v. Woods*, Ibid. 204; and the whole of that class; while the particular circumstances in some of the other cases, and probably still more, a disposition to avoid the supposition that the

testator was providing for the case of his legatee's pre-decease, may have given rise to those decisions which followed ; *Brograve v. Winder*, 2 Ves. jun. 634 ; and *Daniell v. Daniell*, 6 Ves. 297 ; and the others which shook the former series, and prepared the way for *Cripps v. Wolcott*, 4 Madd. 11, determined by the present Master of the Rolls. It cannot be doubted that, if this last case is to be taken as settling the law upon this head, it reconciles that law to the whole current of authority upon the point so intimately connected with it, which is now before us. If,—which it would now be most inconvenient to doubt,—*Cripps v. Wolcott* is to stand against the cases overruled by it, there may be some difficulty in supporting his Honor's present decision upon principle ; but though *Cripps v. Wolcott* were set aside, and the former rule of construction restored, no countenance whatever would be gained for the judgment now under review.

In the present case there is no interest given in the first instance, and consequently no period, within which the death must happen to vest the bequest over, can be found from any life estate. But the whole clause taken together furnishes a period for the restriction at once natural and obvious, consistent with the plain meaning of the testator, and peculiarly agreeable to the frame of the bequest. He first gives his nieces the monies, when and if they shall attain twenty-one. At the age of majority, therefore, the legacies vest, and, as far as this branch of the clause goes, vest absolutely. He then gives those legacies to

their sole and separate use, free from the debts or control of their husbands. Legacies so given to vest at a specified time, and so secured to the objects of the gift exclusively, can only be revoked,—for, partially they are revoked, if they are converted into life interests,—can only be so altered and retracted, by the most plain, unambiguous, and unequivocal proviso; and the Court will justly in dubio prefer that construction of any subsequent clause, which should make it consistent with the intention plainly expressed in the preceding part. If we read the latter part as contemplating a dying at any time, and as converting the legatee's interest, from an absolute interest in a capital sum into a life annuity, in the event of her leaving a child at her death, we entirely destroy the first part of the clause which provides for the capital vesting at twenty-one. According to this construction she has attained her age of twenty-one in vain; for, at that period so anxiously pointed out by the will as the time when she was to receive the sum of 2000*l.*, she only acquired the chance of her will operating upon it in case she dies childless: during all the days of her life she has no more control over it, after twenty-one, than she had before. It appears quite clear to me, that the other construction is the sound one. Having first provided for the legacy vesting when the legatee is of age, and secured it against the interference of others in the event of marriage, the testator provides for the case of the legatee dying under age, and leaving a child or children; in that case they

take their mother's legacy, because she did not live till it vested in her. This seems the better restriction to introduce, and more in accordance both with the probability of the thing and with the authorities, than if we read "in case of death," as describing the legatee's pre-deceasing the testator. But that the construction adopted below—of death at any time—is inconsistent with all the cases, from the earliest downwards, I feel fully assured, and shall now proceed to show.

In doing so, I have no occasion to refer to more cases than I have already cited in support of the construction which I put upon the clause. Having referred to the judgments of Sir W. Grant, I may add the case of *King v. Taylor*, decided by Lord Alvanley, and reported in 5 Ves. 806, where the bequest was to a son, when he should attain the age of twenty-three, and to a daughter, with a provision for securing her interest during coverture, and if either child should die, then the other was to have the share: and his Lordship, in declaring both legacies to vest absolutely, the one at twenty-three, the other at the testator's death, dwells much on the time of vesting being specified as to the son's portion, and shows how this case differs from decisions sometimes supposed to throw doubt upon the doctrine. The same difference, it may be observed, exists in a stronger degree in the present case.

But it may be fit that we should advert to those cases which have been supposed to proceed upon a different view. A little attention will show that these in reality stand in no

kind of conflict with the others, if we except perhaps the solitary decision of *Douglas v. Chalmers*, 2 Ves. jun. 501. They are not numerous, and they all turned upon very special circumstances. Thus *Billings v. Sandom*, 1 Bro. C. C. 393, was a bequest to A. of 1000*l.*; and, in case of the legatee's death, 800*l.* of it was given to B., and 200*l.* to C. The manner of dividing the sum between two, in unequal portions, might perhaps be thought to indicate a peculiar contemplation of the legatees over. But the decision did not go upon that. Lord Thurlow particularly relied upon the residuary clause, which expressly gave to the same A. the residue to be disposed of as she should think proper; and his judgment plainly rested upon the contrast between the testator's expression when he clearly intended to give her the absolute interest, and his expression in giving the legacy when he did not bring out his meaning distinctly. That this was the ground is sufficiently clear from the report; but it is put upon this, and with approbation, by Sir W. Grant, in *Cambridge v. Rous*, 8 Ves. 22, where he comments upon Lord Thurlow's decision. So, too, in *Nowlan v. Nelligan*, 1 Bro. C. C. 489, the same learned judge held it clear, from the very peculiar manner in which the daughter is mentioned, and also the widow (the legatee), in relation to the daughter, that the latter was at all events to take something; and no other way was left to accomplish this, but by giving effect to the executory bequest, and holding the death of the first taker to mean her death at any time. This

view of Lord Thurlow's reasons is borne out, and an approval of them expressed, by Sir W. Grant's comments, in the case so often referred to, of *Cambridge v. Rous*. It is needless to mention *Chalmers v. Storil*, 2 Ves. & Bea. 222, as Sir W. Grant did not decide that part of the question which touches this case, thinking it very doubtful upon the whole will whether the widow took an absolute or a life interest. The ground of the doubt, as far as regards the personalty, must have been, that the case of the children, the legatees over, pre-deceasing the widow, the first legatee, is also provided for. She in that case takes a life interest in their shares, and a further provision is then made for the death of both widow and children.

There remains therefore to be considered only the case of *Douglas v. Chalmer* already mentioned, upon which it may, first of all, be observed, that, with reference to the present case, it differs in this material particular—it was a bequest over in case of death only, without more, no time being given either by preceding life estate, or period of vesting specified. So that the Court had only to chuse between giving effect to the executory bequest, or supposing the testator to have had in view the lapse by pre-decease of the first taker. That decision, therefore, might stand well with the one I am now making, inasmuch as we are not driven here to elect between giving effect to the executory bequest and holding the first grant to vest at the testator's death, but take the other course always to be preferred where the

will leaves it open, namely, of adopting a period to which the death may relate other than the testator's lifetime. But though this consideration removes *Douglas v. Chalmer* out of the way, as regards our present purpose, it may be said to leave it in conflict with the whole of the decisions where the testator's life was the period fixed upon. Let us see then if there be not peculiarities in that case whereby it may be reconciled with those other cases, or if there be not something in the decision itself to diminish its value as an authority. The question arose upon the gift of the residue to Lady Douglas, and, in case of her decease, to her children. Lord Loughborough relied mainly upon the codicil. He considered the manner in which a jewel was there given to Lady Douglas as indicating that the testatrix could not have intended to give her the absolute interest in the residue, for that would have made this part of the codicil superfluous. He also relied upon the manner in which the codicil provides for a case of pre-deceasing the testatrix, which is done in very express words—"if A. B. should be dead before me,"—as showing that such pre-decease could not have been in her contemplation when she framed the legacy to Lady D. And when his Lordship came to give his second judgment, upon the rehearing, he dwelt upon another circumstance, which might very fairly be taken into the account, namely, that giving an absolute interest to Lady D. was giving it to her husband, there being no sole and separate use provided

for, and it seemed unlikely the testatrix should intend to give it to the husband, as the mention of the children showed a desire that they should take, and not their father. It need hardly be remarked that those peculiarities on which Lord Loughborough relied belong none of them to the present case, and only one of them (the last) to any of the other cases. That they are sufficient to reconcile the decision with those other cases is perhaps more than can safely be affirmed, although Lord Alvanley and other judges, in commenting upon it, seem to think that they go a great way towards effecting such a reconciliation. The *language* of Lord Loughborough certainly cannot be so reconciled, especially where he says, that, taken by themselves, the words admit of little doubt, such a gift implying naturally that the parent is to take for life, and the children the capital at the parent's death,—a proposition in the very teeth of all the authorities. The observation, too, upon *Nowlan v. Nelligan*, that it was a much stronger case, is not to be supported. These things certainly lessen the authority of this decision in so far as it may be in conflict with the others. But a bias appears to have existed in the learned judge's mind towards the construction which he adopted, arising from his extra-judicial knowledge of a fact not in the cause. Lord Douglas had been married before, and had children by his first wife. It was the children of the second wife whom the testatrix, their grandmother, plainly meant to favour; and yet the construction which should give Lady Douglas an absolute interest, by giving it to

Lord D., brought in the children of the first marriage equally with the objects of her bounty. Lord Loughborough very fairly admits that this consideration moved him; but it is clear that he had no right to regard it (a). Then it must be remembered that three years afterwards the same learned judge decided *Hinckley v. Simmons*, 4 Ves. 160, according to the current of authorities, and without any hesitation. It was a bequest of all the testatrix's fortune to A.; and in case of her death, to B. Lord Loughborough said, that however hard, it was a case of very little difficulty, and cited *Lowfield v. Stoneham*, but made no reference to *Douglas v. Chalmer*, from which one of two consequences must be allowed to follow—either that he did not adhere to his former opinion, or, which is most probable, that he considered the former decision to depend upon the peculiarities of the case, and not to touch the general rule.

But a discrepancy much more difficult to be reconciled is to be observed between the decision now under appeal and an earlier determination of the present Master of the Rolls in the case of *Slade v. Milner*. That was a series of bequests to different persons, chiefly females, and in each there was a proviso, that in case of her death the said sum should be divided

(a) Lord Loughborough had an intimate acquaintance with the circumstances of the noble family in question, from having been their counsel in the famous *Douglas* cause before the House of Lords, and it would have been very difficult to divest himself of that knowledge.

equally among her children. The residuary clause gave the residue to three persons, among whom was one of the former legatees, and added, that in case they should have departed this life before the testatrix, and consequently before the will could take place, then their shares of the residue should go among the children of two of them and of another person. His Honor held the case so clear against the executory bequest on the death of the legatees, that he called on the other party to support it, and decided that the natural sense of the words plainly gave an absolute interest, and that there was nothing in any other part of the will to disturb this inference. Yet the residuary clause was clearly so framed as to show that when the testatrix contemplated the pre-decease of legatees, she could use very precise terms. Indeed this residuary clause affords to the full as strong an argument in favour of the executory bequest as that on which Lord Loughborough relied so much in *Douglas v. Chalmer*; and it is remarkable that the case with which this last comes most into collision is *Slade v. Milner*, decided without any doubt by the same learned judge, whose present decree, if it rests on any precedent at all, can only be supported upon the authority of that very case, or rather of the language of that very case, of *Douglas v. Chalmer*.

I am on the whole clearly of opinion that the decree cannot stand; that it gives a construction to the will neither consistent with the natural import of the words, nor borne out by any autho-

rity; while it is contradicted by all the decisions upon the point, and almost all the authority upon questions of a similar kind.

The judgment must therefore be reversed, and the nieces of the testator declared to take an absolute interest in their legacies of 2000*l.* upon attaining the age of twenty-one respectively.

KIRKBY v. WRIGHT.

ON the 1st January, 1819, Mr. G. Wright sold his good-will in a newspaper, together with his stock in trade, to T. Kirkby, T. Inchbald, and W. Gawtress, the two last of whom carried on the business of printers, for the sum of 3700*l.*, payable by instalments, and secured by a bond, at the foot of which was the ensuing proviso:—

“ Provided always, and it is hereby agreed, that in case the whole concern sold by the above-named G. Wright to the above-bounden T. Kirkby, T. Inchbald, and W. Gawtress, and the present printing business of Messrs. Inchbald and Gawtress added to it do not produce a net profit of 4000*l.* by the 1st day of July, 1822, he the said G. Wright, his heirs, executors, or administrators, shall and will allow to them the said T. Kirkby, T. Inchbald, and W. Gawtress, at that period, such sum of money as will, with the profit they, the said T. Kirkby, T. Inchbald, and W. Gawtress, may make from the said two businesses, amount to, and be the clear profit of, 4000*l.* during that time.”

The profits of the newspaper and of the printing business had not, on the 1st July, 1822, reached 4000*l.*, and the main question in the cause was, whether, in ascertaining the deficiency, interest ought not to be allowed on an additional capital brought into the concern.

There was a memorandum of agreement signed prior to the execution of the bond, and which, it was contended, threw light on the intent of the proviso.

The judgment shows the remaining facts.

Sir E. Sugden and Mr. Hayter for the plaintiffs. For the defendant Mr. Attorney-General and Mr. Barber.

Nov. 25, 1833.

Guarantee that the net profit of a business should amount to a certain sum: Held, that the interest of further capital is to be excluded in computing such net profit.

Meaning of the expression "net profit" in general.

LORD CHANCELLOR.—It is peculiarly necessary, in a case of this description, to examine what the real nature of the transaction was, and what it is that the parties intended to effect by the proviso, which the Court is called upon to construe.

Mr. Wright had sold to Messrs. Kirkby, then carrying on the business of printers, the concern of a newspaper, to be paid for by instalments. To the bond for securing those instalments is added a proviso, to be taken as an agreement, signed by Mr. Wright, and witnessed by his solicitor, the plain purpose of which is to guarantee the concern sold up to a certain amount of profit. As the purchasers had their own printing concern besides, and as from the nature of the thing the two concerns must be carried on together, so that the accounts of their profits could hardly be kept separate, it was almost of necessity that the guarantee should cover and apply to the amount of both the former trade of the purchasers and the new concern they were about to embark in. But it was clearly the profits of the latter which formed the object of the guarantee by the vendor. This concern, then, was warranted profitable up to a certain amount. What concern? At what time? And in what state? Manifestly the concern sold—at the time of the purchase—and in the state in which it then was. To put another construction upon the guarantee would be doing great violence to the plain import of the whole

transaction. Mr. Wright was simply saying—
“ You, who have bought my paper, shall be secure of making 4000*l.* net profit by it, in the course of the first three years and a half of your possession, including the net profit of your printing business, which you will naturally blend with it.” In estimating this profit, of course no deduction whatever was to be made for interest of the capital invested in the purchase. The seller was guaranteeing the value of that purchase—the profits of the capital so invested. He was undertaking to make that capital yield so much as, with the printing profits, should make the sum of 4000*l.*, up to July, 1822. But if any new capital was invested, the interest of that was another and a separate matter. That interest must be deducted from the profits, in order to get at the profits guaranteed of the concern sold. If not, then this absurd consequence would follow, that if a large additional sum were brought into the concern—whether borrowed or advanced by the partners themselves, can make no difference—if the ordinary interest of that sum were received from the concern, and no more profit upon it; nay, suppose the whole concern only to yield four or five per cent. upon that and upon the original purchase money also, the guarantee might be satisfied, Mr. Wright adding to the net profits of the concern, as sold, the profits of the new capital; and thus the guarantee would turn out to be a guarantee of common legal interest; in other words, would be good for nothing, and be the very reverse of what it was intended to be.

Reliance is placed on the memorandum of agreement, which, though unsigned, is shown to have been produced to the parties at the time the bond was executed, and produced in the state in which it now is, and in which it remains uncanceled. Unless the bond and proviso are to be regarded as cumulative with the memorandum, and adding the security of a bond to the earlier instrument; or, in other words, if the bond and proviso are to be regarded as the completion of the whole set of instruments, the memorandum of agreement being only the draft or treaty, we cannot look at it in construing the proviso. And I do not think it right, and it is in my clear opinion not necessary in this case, to look at the earlier instruments at all.

The acting of the parties is consistent with the construction adopted below, and aids that construction. But my opinion is formed upon the nature of the transaction and the words of the proviso—"whole concern sold"—"net profit"—"clear profit." There is no occasion to lay down any general rule as to the effect of the expression "net profit." It is preposterous to speak of such an expression as having an inflexible sense. There may be cases in which the use of such words would not exclude the interest of capital from the calculation of profit. Indeed, in this case, from the plain intention of the instrument, the interest of the capital invested in the purchase is excluded, although very possibly the parties in their accounts kept with each other entered a sum for interest of that capital, as well as of any addi-

tional sums borrowed for or otherwise brought into the concern.

The construction contended for, that this is not a guarantee, appears to be wholly untenable; at least it was contended that there was only a restricted guarantee, or guarantee up to a certain amount—the amount of the sum stated in the bond—and this chiefly because of the expression “allowed.” For this there is no colour in the frame of the proviso, which says, “allow” absolutely, and not allow out of the instalments; but it also says, allow such sum as with the profits of the printing concern will make the clear profits 4000*l*. This is quite inconsistent with the restricted operation contended for.

The judgment is affirmed with costs.

FOLEY v. PARRY.

WILLIAM PARRY devised his mansion-house and real estates to the defendant, his widow, for life, remainder to the plaintiff, William Walter Foley, son of his deceased nephew, for life, remainder to the plaintiff's children, &c.; and after bequeathing his household furniture, farming stock, and other effects in and about his mansion-house to his widow absolutely, he gave to her the residue of his personalty for life, and upon her death he gave the same to the plaintiff, to be paid at twenty-one. The will contained various provisions, technically expressed, and also this clause—“It is my particular wish and request that my dear wife and Walter Williams, esquire, the grandfather of the said William Walter Foley, will superintend and take care of his education, so as to fit him for any respectable profession or employ-

ment." W. Williams not only took no benefit under the will, but he was mentioned in no part of it except this clause.

The object of the suit was to have the plaintiff maintained and educated either out of the income or corpus of the estates, or part of the estates, given to the widow for life ; and evidence had been taken from which it appeared that upon the plaintiff's father going to India in 1810, he had lodged money in the testator's hands for the expense of his son's maintenance and education; that the latter had been placed by the testator at school with W. Williams's concurrence, &c. But to this evidence the judgment attached no importance.

For the plaintiff, Sir E. Sugden and Mr. Spence. For the defendant, Mr. Knight and Mr. Duckworth.

Nov. 25, 1833.

Real and personal estates given to the testator's widow for life, remainder to his great nephew an infant, and a wish expressed that the widow and the grandfather of the infant would superintend and take care of his education, so as to fit him for a respectable profession : Held, regard being had to the whole contents of the will, that the widow's life interest was charged with the expense of maintaining and educating the infant and settling him in a profession.

LORD CHANCELLOR.—The question in this case arises not so much upon the construction of the words in the disputed clause, because, if they stood alone, and the Court were called upon to pronounce whether or not they amounted to a charge upon the life interest given to the widow, in favour of the nephew for the expense of his maintenance and education and settlement in a profession, it would be impossible to say that the words of themselves were sufficient for that purpose. The grandfather who takes nothing under the will is joined with the wife, and the words of wish and request are addressed to both equally. The words, too, though abundantly strong as regards the requisition, are feeble as regards maintenance ; and are susceptible, though but barely susceptible, of a different construction, namely, as only amounting to entrusting the widow and grandfather with a general superintendence in the nature of guardianship, which, by law, the testator could not in form and absolutely create.

But the Court is not confined to the precise clause. It is entitled to look through the whole instrument here, as in every other case, and if it appears from the whole that the maker of it could have had but one intention, that is to say, cannot, without straining after a bare possibility, be supposed to have had any other meaning in the words used than to express a wish or desire that the devisee should perform a given duty by means of the fund given, that fund is as much affected with a trust as if the most precise and formal words had been employed. It is impossible to read this will, and weigh the whole of its contents, without coming to the conclusion that the testator wished—that is, directed—his nephew to be maintained and educated by his wife. And I think he only comprehended the grandfather in the recommendation, with a view to obtaining for his widow the assistance of that male relative of the infant in performing those offices, the expense of which the widow was to defray out of her legacy.

It cannot be denied that the precatory words are as strong as in almost any of the cases on the subject, and much more precise than in most of them. The cases of *Mason v. Limbury*, cited in Ambler, p. 4; *Harding v. Glyn*, 1 Atk. 469; *Pierson v. Garnet*, 2 Bro. C. C. 38, 226; *Brown v. Higgs*, 4 Ves. 708, 5 Ves. 495, 8 Ves. 561, and many others which might be referred to, sufficiently prove that such expressions as “desire,” “request,” “recommend,” nay even “authorize and empower,” are sufficient to impose an obligation, which this Court will enforce. The last-

mentioned case of *Brown v. Higgs*, was the subject of very great discussion ; and after being fully considered at the Rolls by Lord Alvanley, was heard before Lord Eldon, on appeal, and afterwards decided ultimately in the House of Lords. The question, whether the words gave a power, which, having been unexecuted, the Court could not execute, or create a trust which the Court would cause to be performed, was argued, not upon the clause itself, but upon the whole context and circumstances of the will ; as were indeed many of the other cases, from *Marlborough v. Godolphin*, 2 Ves. sen. 61, downwards. And although the import of the words themselves, as far as regards the question whether they are mandatory or not, in the present instance, is quite plain enough without going to the rest of the instrument, yet we resort to the context and circumstances here, as the Court did in those cases, for the purpose of discovering the objects to which the directions were pointed. And from that examination it results that this could have been none other than maintenance and education until the infant should attain majority and be settled in a respectable profession. As Lord Redesdale observes, in a very distinct statement of the doctrine of the Court on this subject, *Cary v. Cary*, 2 Sch. & Lef. 173 : if the objects to which a will refers are so defined that a Court can act upon the desire expressed, those words are imperative upon the persons to whom they are addressed. And the objects are here,—as gathered from the words and the context, and circumstances disclosed on the face of the

will,—not superintendence purely of education, while the infant starved, to whom the absolute property is given in reversion expectant upon the widow's life interest, but superintendence and *taking care of his education so as* to fit him for a profession—in all which his support must be comprehended.

I have therefore come to the same conclusion with his Honor, not intending by any means to say, what no one can indeed maintain, that “education” by itself implies always maintenance, or that “superintendence” by itself implies support, or even that “taking care,” though much stronger in this sense, must needs signify in every case defraying all expenses; but that, in the present instance, there is no rational way of construing the will, other than giving those expressions such significations.

I have examined all the cases with the view of finding if there was any one that could be deemed repugnant to the construction which his Honor has here adopted, and I find none of them derogatory to, and many confirmatory of it. The judgment must therefore be affirmed.

MACKINNON *v.* SEWELL.

THE will of Lydia Vernon, after bequeathing the residue of her personalty (to be vested in the funds, or on real securities,) upon certain trusts, for the benefit of her daughter Caroline Dewar, for life, proceeded as follows : " And from and after her decease upon trust to assign, transfer, and pay the principal thereof, with the dividends and interest then grown, unto my grand-daughter Caroline Lydia Dewar, if she shall survive her mother, the said Caroline Dewar, and live to attain the age of twenty-one years ; and in the meantime, after her mother's decease, to pay and apply the dividends, interest, and income thereof, for and towards her maintenance and education. And in case the said Caroline Lydia Dewar shall not survive her said mother and live to attain the age of twenty-one years, then upon trust to assign, transfer, and pay all the said trust stocks, and premises to such other child or children of my said daughter Caroline Dewar, in such manner as she shall, by any writing under her hand, notwithstanding her coverture, nominate, direct, or appoint ; and for want of such nomination, direction, or appointment, then in trust to assign, transfer, and pay all the said trust stocks, securities, and premises to such other child or children of my said daughter Caroline Dewar as shall be living at the time of her decease, equally to be divided between them, share and share alike, if more than one ; and if but one, then the whole to such only child ; and to be paid them respectively after their said mother's decease, when and as they respectively shall have attained the age of twenty-one years ; and in the meantime, after their said mother's decease, the income of their respective portions to be paid or applied for or towards their maintenance and education respectively ; and in case of the death of any of them before such age, then the share or shares of such child or children so dying shall go and be paid to the survivors or survivor of them, at such time as his, her, or their original share or shares is or are made payable as aforesaid. And if all such other

children of my said daughter Caroline Dewar shall happen to die before attainment of the said age of twenty-one years, then in trust for and I give the same to my daughter Louisa Mackinnon, her executors, administrators, and assigns."

The events out of which the question in this case sprung, are noticed in the judgment. It came on by way of appeal from a decree of the Vice-Chancellor.

In support of the appeal, Sir E. Sugden and Mr. Barber; Mr. Pepys, Mr. Swanson, and Mr. Ching. In opposition to it, Mr. Attorney-General, Mr. Knight, and Mr. Beames.

LORD CHANCELLOR.—The question here arises upon the construction of Lydia Vernon's will, the residuary clause of which gives the remainder of her personalty to her daughter Caroline Dewar for life, and after her decease to her grand-daughter Caroline Lydia, if she shall survive her mother and attain the age of twenty-one; and in case she shall not survive her mother and attain that age, to such of Caroline's other children as she shall appoint; and in default of appointment, to such other child or children of Caroline as shall be living at the time of her death, to be paid when they respectively attain twenty-one. It then gives the shares of such surviving children who may die under twenty-one to the survivors or survivor, to be paid at his or their reaching that age. Last of all comes the gift over, upon which the case turns, and which provides for the event of all the other children dying under twenty-one. These provisions already recited having arisen from the supposition that Caroline Lydia might not come within the description of surviving her mother and attaining twenty-one, all

Dec. 16, 1833.

Bequest to A. for life, remainder to her daughter if she should survive and attain 21; but if not, to such other children of A. as should be living at her death and attain 21; and if all such other children of A. should die before 21, then to B. A. survived her daughter, and had only one other child, but who also died in her lifetime, having, however, attained 21. It was held that B. took.

General observations upon cases of conditional limitations.

relate to the other children of Caroline, and the gift over is confined to the same class, viz. the children other than Caroline Lydia — Caroline Lydia having been, as it were, disposed of. The same provisions, too, had contemplated the cases of one or more of the children of Caroline dying under age. There remained to be provided for the case of all those children so dying, and for that the latter part of the clause—the gift over—provides, by directing that if all such other children of Caroline happen to die under age, then the residue shall go to the testatrix's other daughter, Louisa Mackinnon, her executors, administrators, and assigns. Caroline Lydia died in her mother's lifetime; and John, her brother, in whose favour Caroline partially executed the power of appointment, survived Caroline Lydia, but pre-deceased his mother—not, however, before he had attained twenty-one. Thus he was, under the clause in the will providing for default of appointment, excluded from all share of the residue beyond what he took under the partial appointment, because he did not survive his mother. But as he died after majority, the question is, under the last clause, whether or not the gift over to Louisa Mackinnon takes effect; that gift being made, if all such other children of Caroline die under age. Was he, then, one of this class? If he was, clearly the executory limitation cannot take effect; for all the children of Caroline did not die under age. Supposing, therefore, we were to read the words “all such other children of Caroline,” as if they stood “all

the other children of Caroline," that is, all except Caroline Lydia, but without any other specification or distinction ; it is unquestionable that the gift over could not take effect without doing violence to the plain meaning of the clause ; for not only the event has not happened upon which the executory limitation was made to depend, but the contrary has happened — one of Caroline's other children having reached majority. Nor can this position be denied upon the ground of the provision being a conditional limitation, and the event having only defeated a precedent limitation, or removed out of the way a precedent estate. For words importing contingency or condition are not to be taken as creating a conditional limitation, unless to effect the plain meaning of the testator, and never where the intention clearly imports a condition precedent ; and nothing can differ more than a gift over if all Caroline's children die under age, and a gift over if all of them do not reach majority. But the decree of his Honor does not rest upon any such ground. The respondent does not read the words as if they were "all the other children of Caroline," but takes them literally as they stand, "all such other children of Caroline," and contends that they describe one class of the children of Caroline, namely, those who survived her. Now, as none survived her, and therefore that class never came into existence, it is argued that the intention is effectually fulfilled by taking the words as words of limitation ; and thus following the authority of that class of cases of which *Jones*

v. *Westcomb*, 1 Eq. Ca. Ab. 245, is the leading, though certainly not the strongest, or the most remarkable decision.

To support the decree then, we must be satisfied of two things—first, that the words bear the construction put upon them; and secondly, that the clause so construed comes within the principle, and may be taken upon the authorities as only apparently a condition, but really a limitation.

First,—I am clearly of opinion that the words describe such children of Caroline as survived her; and this, whether we regard their literal import, or take them in connection with the rest of the will, or consider the place in which they occur. The testatrix, having first provided for Caroline Lydia's surviving Caroline and reaching twenty-one, proceeded to provide for the opposite event of her not surviving and attaining majority. In that case, if she either pre-deceased or died under age, she was to take nothing whatever. All the provisions that follow, therefore, relate to the other children of Caroline, Caroline Lydia being now supposed to be out of the question. A power is first given to Caroline to appoint among those other children, without any restriction either as to surviving or attaining majority; and this is the only part of the will where both the one and the other of those circumstances are not introduced. Then come the provisions in case that power shall not be exercised. The residue is to go among the other children of Caroline who shall survive her, with a clause of accruer in case any shall die under twenty-one. And although

some doubt might arise upon the construction of this clause, whether the accruing or only the original shares are subject to its operation, the rest of the provisions make it quite unnecessary to settle this point. But one thing is unquestionable ; the class of persons indicated and dealt with through the whole of this branch of the will, are the same—namely, children of Caroline surviving her. None else are or can be here referred to,—“ they,” “ them,” “ any of them,” all mean those surviving children. Then immediately follow the expressions “ such child,” or “ children so dying,” that is, under twenty-one ; their shares are to go to the survivors of them (that is, of the survivors of Caroline), and to be paid at the age of twenty-one. It is important to remark, that immediately after this plain reference to the survivor of the surviving children, comes the clause in question containing the gift over, “ and if all such other children of Caroline shall happen to die before attaining the said age of twenty-one, &c.” So that this clause is really a part of this branch of the will, the subject of which is confined to the children of Caroline surviving her ; it plainly refers to the immediately preceding words of reference, “ such,” “ them,” “ any of them,” and, what is almost decisive of the meaning, independent of the words themselves, it provides for the very event which the preceding provisions had left unprovided for :—those provisions having contemplated the death under age of some of the surviving children, and made an accruer of their shares to those who attained twenty-one ; but this last provision, con-

templating the event of them all dying under age, in which case the residue is to go over to Louisa Mackinnon—"all such other," in contradistinction to one or more of such other, the case already provided for.

From this construction, which is indeed the natural one—the other doing great violence both to the language of the clause and to its connection with the others—it would follow that if any one of Caroline's children had survived her and died under age, the executory limitation over would have taken effect, according to the strictest construction of the provision, and taking the contingency as a condition precedent; for that condition would then have been most literally fulfilled, as all the surviving children of Caroline would have died under twenty-one. John, who pre-deceased her, it is true, did reach that age, but he does not come within the description of "all such other children;" he was not a surviving child.

Secondly,—But as no child survived Caroline, and the class described therefore never came into existence, we are next to consider the second proposition upon which the decree rests, that the clause may be taken as importing limitation and not a precedent condition.

What has been said upon the sense of the words and their connection with the foregoing provisions, greatly aids this view of the matter. It shows the intention to have been a providing for the event left unprovided for—the event of all those children being removed before majority.

Surviving their mother and coming of age are the things constantly kept in view throughout this branch of the will, and, both together; surviving goes for nothing unless they live to twenty-one, and vice versâ. Caroline Lydia, the first legatee of the residue, takes nothing if she either predeceases her mother, attaining twenty-one, or survives her and dies under twenty-one; nay, in either case, she not only takes nothing under the will directly, but she is excluded from the benefit of the appointment, the power being confined to the other children at whatever time they die. Then, all the gifts to those other children are carefully confined to such as reach majority; and there seems nothing at all inconsistent with this frame of the residuary clause, in supposing that the testatrix intended to prefer her daughter Louisa Mackinnon, if none of her grandchildren survived their mother and reached twenty-one; those two conditions being throughout in her view, nor ever lost sight of, except in one instance only, where she is not herself distributing the residue, but devolving the distribution of it upon another, by creating a power. There seems therefore nothing inconsistent with the general intent in giving effect to this executory limitation, by treating it as a gift over upon the removal out of the way of the preceding interests, in whatever manner that removal is effected: whether by the persons coming into existence so as to make the interests vest, and their deceasing under twenty-one, so as again to divest their estates, or by their never coming into existence, and thus never taking the interests at all.

As it may be said that the authorities for the doctrine to which I am referring do not exactly touch a gift of this precise kind, we may examine those cases somewhat more nearly, in order to ascertain whether the difference is one of principle, or only in the particulars. The apparent diversity, to state it generally, is this; that in most, if not all, the cases, the event which actually happened comprehended that for which the gift provided, as the greater includes the less, so that the one of necessity involved the other in substance and effect; whereas here there is no such necessary consequence. Thus, in a gift to A., if the child of which B. is enceinte does not reach twenty-one, the event guarded against of B.'s child reaching twenty-one, never can happen if she is not enceinte; but in a gift to A., if B.'s child surviving her does not reach twenty-one, the event guarded against of B.'s child reaching twenty-one may happen though it dies before its mother. Accordingly it will be found, that to reconcile the present case with the authorities, we must consider the event guarded against to be, not a child of Caroline reaching twenty-one, but a *surviving* child of Caroline reaching that age; and the whole frame of the clause, which requires that the children should survive their mother as well as attain majority, justifies us in adopting this qualification.

All, or almost all, the cases upon which this doctrine is founded, are referable to one consideration, which it is very material to keep in view. The construction which they authorize never is inconsistent with, far less contrary to, the plain

intention of the clause itself, but only aids or furthers that intention, by supplying a manifest omission. In other words, no real difference is made in the result, for the event contemplated has not happened, but something equivalent has taken place; that is, something which made it impossible that the result could be otherwise than that upon which the executory limitation was made to depend. Almost all the cases are those of double contingencies, the second being of a negative nature, so that the first not happening amounts to the same thing as if both had happened. Thus, a bequest over to A., in case the first takers, the unborn children of B., die before they reach twenty-one, read as a condition, is a bequest to A., if B. has children, and they do not live to twenty-one. And the first, or affirmative contingency, not happening, it follows of necessity, that the second, or negative, must. If it is read as to its substance and import, and not resolved into its parts, the bequest is, in case no child of B. reaches majority; and of course none can, if he have none. This is the simplest case, but the others are all of a like kind in principle. Thus, a gift over, in the event of the child in ventre sa mere, dying under age, is a gift, if there be such a child born, and it does not reach majority. It cannot reach majority if it never existed, which was the case of *Jones v. Westcomb*, and *Statham v. Bell*, 1 Cowp. 40; or if it was still-born, as in *Foster v. Cook*, 3 Bro.C.C.347. Therefore, taking the condition in these cases to be, what it is in substance, that no child should reach

twenty-one, even as a condition precedent it has been strictly fulfilled. At any rate no effect is given to the executory limitation, which is repugnant to the conclusion that would have flowed from considering the matter in the light of a condition precedent. In like manner, when the event upon the happening of which the executory limitation vests, is, that the testatrix should have "but one child," this must be considered as meaning, "no more than one;" unless there be something in the limitation that connects it with the existence of one at the least, in which case the condition becomes affirmative, and not negative. Accordingly, in *Murray v. Jones*, 2 Ves. & Bea. 313, it was held, that such a condition meant—in case there should be no more children than one; and there being none, the event had literally happened: but it is clear, from Sir Wm. Grant's argument, that if any thing whatever had turned upon there being one son, he would have decided the other way. This case, it may be observed, is not so plainly one upon the principle established in *Jones v. Westcomb*, as some others; and indeed it did not turn entirely upon that part of the able and luminous argument of the learned judge, which was addressed to the present question.

The general observation, which has been made upon the foundation of this doctrine, applies to all the cases. Thus, in *Avelyn v. Ward*, 1 Ves. sen. 420, the devise over to Ward was, if Urling, the preceding devisee, should neglect to execute a release after the testator's death, and Urling died in the testator's lifetime. This was held a conditional

limitation, and not a case of condition ; but there was nothing in this view repugnant to the nature of the condition, if it had been taken as such ; for Urling pre-deceasing the testator, and his surviving him and neglecting to execute the release, were one and the same thing as regarded the release. So, in *Doe v. Scott*, 3 Mau. & Sel. 300, if the devisee over had survived the testatrix, he would have taken, though there had been no default in the first devisee, who had also died before her, to convey an estate to him, within six months after the decease of the testatrix. Here, plainly, the event contemplated, of no conveyance being made, was consistent with, or rather was secured by, the event which actually happened—the pre-decease of the first devisee. Again ; where the gift is to the testator's children surviving him, and if they all die under twenty-one, then over, the condition is substantially fulfilled—the event in effect happens—if he leaves no children, for his meaning clearly was to give the residue over, if no child reached majority ; and none could, if none existed. This was the case of *Meadows v. Parry*, 1 Ves. & Bea. 124. Even the cases which seem less to fall within the scope of these observations, when considered attentively, are no exceptions. Thus *Holcroft's* case, in Moore, 486, was that of a limitation to the first and other sons of A., in tail, enumerating three ; and then, if the fourth died without issue, to B. ; and it might be considered as really importing a gift to B., upon the failure of the issue of A.'s first four sons in succession ; an event included of necessity in that of A.

having but one son, and that son dying without issue.

I have stated these things for the purpose of showing that the cases all go upon a very rational and intelligible principle; a regard to the substantial effect of the contingency specified, and so to the real intent of the testator. In all of them the clause may be taken as a condition, and treated as such, without any violence, provided we regard the substance and result, and not the mere form of the provision. And looking to the true import and effect it will appear that, even taken as precedent conditions, they have been essentially fulfilled. Wherever this is not the case, wherever the words plainly import a condition as in the testator's contemplation, and where that condition cannot be so understood, as that it is substantially complied with by the event which has actually happened, the gift over fails. Thus, in *Murray v. Jones*, there was nothing to prevent the Court from reading the contingency of there being "but one child," as if it were "provided there be no more children than one;" and this being satisfied, and more than satisfied, by the event of there not being even one, the devise over took effect; but Sir W. Grant distinctly admitted, that if any thing had turned upon one child coming in esse, the executory limitation would have failed; in other words, the contingency could not have been read negatively "no more children than one," but must have been taken affirmatively, "provided there be a child," and then the actual event would not only have been different from, but contrary to, the event contemplated

in the limitation. So in *Doe v. Shippard*, 1 Doug. 75, a devise to the testator's daughter for life, in case she survived her husband, with remainder to his grandson in tail, and remainders over, was held to be on condition that she survived; and her pre-decease defeated the remainders, there having been a preceding limitation to the husband for life, in the event of his surviving her. Thus, too, in *Doo v. Brabant*, 4 Term R. 706, where a legacy was given to A., at twenty-one; if she died under age, and left children, then to them; and if under age, without leaving any child, or if all she left died under age, then over; and she pre-deceased the testatrix, but after attaining majority, and leaving children; the principle of *Jones v. Westcomb*, and the other similar cases, was at first supposed by Lord Thurlow to apply, and let in the children: and when he sent a case to law, the same argument was pressed upon the Court of King's Bench; but that Court held it clear that those cases did not affect this, and decided that the legacy to the children failed, as being limited upon an event which had not happened; nothing being given to them in any other event. It is clear that in this instance, (*Doo v. Brabant*,) the event which happened could in no way be said to comprehend the contingency contemplated, so as to satisfy, either literally or substantially, the condition upon which the children were to take: and although the case which did arise would probably have been provided for, if it had occurred to the testatrix, yet,

being omitted, the Court could not supply it and make a will for her.

But it seems to me abundantly manifest, that the present case comes within the first class of authorities, and is untouched by the others ;— always assuming that the words are to be taken as I have shown they must be, to import a dying under age of all the children of Caroline who survive their mother. For this is, in effect, a gift upon the failure of any child to survive Caroline and reach majority ; and that failure has happened, or rather more has happened, because none has survived at all, much less has any both survived and reached twenty-one. The class of children, whose dying under age forms the condition, never existed, and nothing turned upon their existing. The gift over was defeated if any surviving child attained twenty-one, but no surviving child existed : just as in the leading case, *Jones v. Westcomb*, the executory limitation was defeated if the child in ventre sa mere reached twenty-one, and there was no child at all in ventre sa mere, and consequently none could reach majority. If, indeed, as was said in another of the cases (*Murray v. Jones*), any thing had turned on there being surviving children of Caroline, the reasoning would have failed ; the contingency would have become affirmative ; the condition, not being capable of being read as we have read it, would not have been fulfilled by the event ; and the gift, limited upon that condition, would have been defeated.

The result of the argument therefore is, that both propositions appear to be established : first, that the words “all such other children,” in the statement of the contingency, mean all the children who survive their mother. And, secondly, that the clause so construed, is an executory limitation which takes effect, although there be no children to answer the description by surviving their mother. But it is fit to observe, that this second proposition depends altogether upon the first, and would not be true, unless the words were allowed the meaning which the first attributes to them. And it must also be observed, that though the first proposition be admitted, the second depends upon taking the whole of the will together ; for if the preceding branches of it had been such as to make the existence of the class material, upon whose dying under age the executory limitation vests, that limitation would have been defeated, by the impossibility which would then have arisen, of considering the event prospectively contemplated as included in the event which actually happened.

Having felt a good deal of doubt on this case when I first considered it ; thinking it also of extreme importance that the rules should be well considered, by which the construction of clauses of frequent occurrence is governed ; and conceiving that there is an *apparent* extension here of the principle established in the older cases, I have thought it necessary to go at large into the question. A full examination of it has satisfied me that the decision is right ; that it *really* re-

quires no extension at all of the principle to support it; and that it is wholly unaffected by the other authorities, while it is well borne out by those upon which it is professedly rested:

The judgment appealed from must therefore be affirmed.

KNIGHT *v.* GOULD.

THE only material clause in the will is inserted in the judgment. The case was an appeal from a decree of the Master of the Rolls.

For the appellants, Mr. Attorney-General and Mr. Girdlestone. For the respondents, Mr. Pepys, Mr. Rolfe, Mr. Jacob, and Mr. Wood.

Dec. 16, 1833.

Residue given to executors, one of whom died in the testatrix's lifetime: The survivors held, from the peculiar language of the bequest, to take the whole.

LORD CHANCELLOR.—The testatrix having appointed three persons trustees for different purposes connected with the administration of her affairs after her death,—amongst others to ascertain certain classes of her relations—allows them a remuneration for their trouble in performing that office. She describes them as those whom she is afterwards to appoint her executors; and, throughout the will, she refers to them by name, not by description, in all the clauses but the one disposing of the residue. She gives them each a legacy of 100*l.*, and towards the end of the will she bequeaths as follows: “I give all the rest and residue of my property not herein or hereinafter specifically bequeathed unto my executors hereinafter named, to

enable them to pay my debts, legacies, funeral and testamentary charges, and also to recompence them for their trouble, equally between them. I do nominate, constitute, and appoint my said trustees, James Kemp, James Kemp the younger, and John Prior Ward, to be the executors of this my will." Now one of these three executors, having pre-deceased the testatrix, the question is, whether or not his share of the residue survives to his co-executors; in other words, whether the whole gift of the residue is to those who shall be the testatrix's executors, by surviving her and assuming the office, or to the three individuals whom she had appointed to that office personally.

It does not appear to be necessary for determining this, that we should decide whether those legatees take as joint tenants, or as tenants in common, and for this reason. If they take as joint tenants, it is true the question is determined in one way; the share of the pre-deceasing legatee survives to his companions. But there may be a tenancy in common, and yet it will not follow that the share of the deceased is undisposed of, and goes to the next of kin. Thus the bequest may be taken to the executors surviving and acting, but as tenants in common; and if such appears to be the right construction, they take the whole, and the present question is decided as the Court below has determined it. There is no occasion therefore to go further than to examine in what capacity the residue is bequeathed to the executors. Is it in their individual capacity, or in their representative? Is it given to them as a

class, or as particular persons, selected for the purpose, and regarded by the testatrix when she made her will in their personal capacity? This is a mere question of construction upon the clause, to be determined, like every such question, by the bequest itself, and by the context; there being no rule of law which gives to any of the terms used an inflexible sense, or compels us to intend one thing only, by making all other meanings inconsistent with legal principles; and I think that, taking the whole matter into consideration, we cannot hesitate in coming to the conclusion, that the testatrix meant to give the residue to her executors, as a class of persons, and not as individuals.

Let us then look to the intention. The testatrix gives her property to the three persons afterwards named her executors, partly as trustees to pay debts and legacies, partly as legatees to receive it beneficially. By the same words, they take in both capacities. Now it is not pretended, that the part which they take to distribute, in performance of their office, *e. g.* to pay legacies, can suffer any abatement because of the pre-decease of one of their number. Why should the part they take to themselves abate any more? It is for trouble in execution of their office. What office? In performing the duty of executors. Whoever performed that duty was to have the recompence. What recompence? The residue. Not their shares of it, but the residue. Equally, no doubt; that is, they who became acting executors, by

surviving the testatrix, were to share all the residue equally, in like manner as she had before paid them for their trouble in making inquiry as to her kindred. Great reliance is placed on the words "equally between them," as giving to these legatees an interest as tenants in common. But independently of the argument I have already adverted to, that this may be the nature of their tenancy, and yet the surviving executors as a class may take, that appears a more natural construction which supposes the gift to be joint. The testatrix has been her own expounder; the writer is the commentator, and can best declare the meaning of the words employed in her own text. She expressly states why the gift is made of the beneficial interest; it is as a reward for performing an office. The office is joint; so, naturally, is the reward. The burthen is cast upon them jointly; it must naturally be presumed that the benefit is intended to be joint also.

That the words "equally between them" are not inflexible, and do not necessarily create a tenancy in common, is certain, both on principle and authority. In *Frewen v. Relfe*, 2 Bro. C. C. 220, it was said that those words only create a tenancy in common with reference to the whole gift; and it was added, that the general intent shall sooner overrule "equally," than "equally" shall overrule the general intent. This was there said upon a clause considerably stronger for tenancy in common, — the individual executors being named severally, which here they are not.

And a similar doctrine was laid down in *Armstrong v. Eldridge*, 3 Bro. C. C. 215. I do not think, however, that we are entitled to consider *Frewen v. Relfe* as bearing more directly on this case than in the point I have mentioned. It is not there stated that any of the legacies had lapsed, and the suit was for the residue; and though Lord Thurlow's argument, which is principally addressed to the clause giving the lapsed legacies to the executors equally among them, may be said to make it probable that the residue was in part composed of lapsed legacies, I rather doubt this, and prefer using the case only as I have now done. Its authority is strong as far as regards the construction put upon the gift of the lapsed legacies, and the force of words directing an equal division. *Page v. Page*, 2 P. Will. 489, was the case of a residue given to executors in sixths expressly; and the interest of an executor who died in the testator's life-time was held not to survive, because each had only a sixth given him. When this decision was cited a few years afterwards to Lord Talbot, he approved of it, on the ground that the frame of the bequest prevented any one from taking more than a sixth. It is difficult to read what his lordship says upon the subject, without being convinced that had the gift been to executors equally, he would have allowed the title by survivorship. For though, each taking one-sixth, all take equally who do take any thing, there is this most essential difference between a gift to a class of six persons equally, and a gift to the same persons of one-

sixth each: that by the former, five may take the whole among them in equal shares, literally complying with the terms of the bequest; but by the latter, the whole cannot be divided among five, or any other smaller number than six, without giving more to each than the sixth expressly allotted. *Owen v. Owen*, 1 Atk. 494, and *Ackerman v. Burrows*, 3 Ves. & Bea. 54, really prove nothing either way; for they lay down no general rule which can govern the present case, both differing from it materially in the circumstances; and the latter being of a very special nature, and turning entirely on the force of a single expression.

The clause now under consideration is peculiarly conceived, and the meaning that has been given to it turns, as it ought, upon that peculiarity. A bequest to children living at the testator's death is, on all hands, admitted to be a bequest to the class; and it survives to those who shall answer the description by surviving the testator. Then why not also a bequest to executors? But it is said the words "hereinafter named" are added; and that those words added to a bequest to "children" would make the description cease to be that of a class. Assuredly it would, because such words are used for the very purpose of specifying certain of the children; and therefore they must expressly exclude the supposition of a class being intended. Whereas, unless executors are named they cannot have any existence as a class at all; and, therefore, so far from those words excluding the idea of executors as a class, they refer to the

act of nomination, whereby alone that class is called into existence; so that nothing can be more fallacious than this objection. Indeed the addition of these words of reference, "hereinafter named," is mere surplusage, and can in no way affect the question; for had they been left out they must of necessity be understood, as no appointment having before been made, those only could be executors, and take in that capacity, who should be thereafter named.

The other objections may be easily disposed of. The gift of 100*l.* would preclude the claims of the executors to all beneficial interest in the residue if there were no other bequest, and if their title rested upon their representative character alone. But here the effect of that gift is destroyed by a subsequent express gift to them of the residue. In continuation of the same argument, it is said that the legacy having destroyed their claim as executors, they can only take the residue as legatees; and therefore cannot take it as executors. But herein is an obvious fallacy; for though the legacy of 100*l.* defeats their claim as executors simply, yet the residue may be given to them as executors; and therefore the proving that they take as legatees does not prove that they may not take as executors also. They are the executors made residuary legatees, quasi executors. A legacy destroys the claim as executor to the residue, because it shows an intention to exclude him, and give him that legacy, and nothing else: but no such presumption can arise here, where the testatrix has expressly re-

vived the claim of the executors, and, by express words, given them the residue as such.

It does not follow from this case, that a bequest of the residue to the executors equally, must in all cases be a gift to them in their representative capacity, and so survive to those who live to take the office. There is no necessity for going beyond the circumstances, which show that the testatrix intended them, in this case, to take as her executors. A change in these circumstances—a different expression as to the persons, or as to the gift—might make it equally clear that she intended them only to take as individuals; and then the force of the word “equally” might be sufficient to let in the argument against the joint taking, just as the particulars of the letter held to be a will in *Ackerman v. Burrows*, were considered to show an intention that the mother and sisters should take individually, and not as a class.

I have gone into the argument of this case fully, because it was thrown out more than once at the bar, that however clear the point might be deemed below, the opinions of the profession were a good deal divided upon it; and some most respectable ones were somewhat irregularly,—but with a pardonable irregularity,—asserted to have considered the decision below wrong. Upon the grounds which I have explained, and taking the question as purely one of the testatrix’s intention, to be gathered from the peculiar nature of the clause, and not altered by its connection with the rest of the will, my own mind is free from all doubt; and the decree must be affirmed.

BENNETT v. COLLEY.

THE judgment embodies all the circumstances.

For the plaintiff, Mr. Pepys, Mr. Tinney, and Mr. Stuart.
For the defendants, Mr. Knight, Mr. Rolfe, and Mr. Jacob.

Dec. 16, 1833.

Tenant for life omitting to renew a lease, his issue in tail, in a suit instituted upwards of thirty years after the expiration of the lease, held under the circumstances entitled to compensation out of his assets.

LORD CHANCELLOR.—Samuel Bennett, being possessed of the moiety of an unexpired term of twenty-one years, held under the Dean and Chapter of Chester, in the rectory and great tithes of Shotwick and Great and Little Sanghall, by his will dated the 13th of September, 1763, devised his manor of Shotwick and also his freehold estates of inheritance at Great and Little Sanghall and elsewhere to his wife for life, and after her decease to John the eldest son of his nephew Samuel Nevitt for life, with remainder to his issue in tail; with a proviso that after the first renewal by his trustees of the lease of the said great tithes at Shotwick, the person for the time being in possession of such tithes under his will should continually renew the same, so that the possession of the same tithes should continue to the parties for the time being possessed of his manor of Shotwick; and he gave the said tithes to the person or persons for the time being possessed of the said manor under his said will. The testator died in September, 1763, and his widow thereupon entered into possession and held the lease (renewing it regularly at the proper periods) till the month of December, 1777, when she died.

Upon her death, Mr. John Nevitt, the tenant for life in remainder under the will, was let into possession of the freehold and leasehold property, and assumed the name of Bennett; and he continued to hold the freehold estates, and to receive the rents and profits thereof, from the year 1777 till his death; but notwithstanding the direction in the will, and the condition thereby imposed on him to keep the lease on foot by renewing it from time to time, he neglected to obtain such renewal in the year 1784, the end of the first seven years, and the lease accordingly expired on the 29th of November, 1798, about two years before the plaintiff Samuel Nevitt Bennett, who was his eldest son and the first tenant in tail in remainder of the devised estates, attained the age of twenty-one. In the year 1800 John Nevitt Bennett and the plaintiff (who had then just come of age) joined in suffering a common recovery of the devised estates. In the year 1830 John Nevitt Bennett died; and in 1831 this suit was instituted by the son against his father's representatives to obtain compensation out of his father's property, for the loss he had suffered in consequence of the non-renewal of the lease.

The answer set up several defences. The defendants denied that the leases under the dean and chapter were renewable except at the discretion of that body. They alleged that John Nevitt Bennett had been very desirous to have the lease renewed, and had applied to the dean and chapter, who had refused: that the lessee of the other moiety of the tithes, Thomas Doe, was,

about the time in question, November 1784, incapable in mind, and could not surrender, so that the lessors might renew: that after Doe's decease, which happened in 1785, John Nevitt Bennett had applied in 1791 and 1792 to have a renewal to him and Ackerly, Doe's representative, but had been refused: that the plaintiff had, before his father's death, possession of a copy of the will of Samuel Bennett, and must have known of the lease; and lastly, that he had acquiesced in the non-renewal.

Issue being joined, a number of witnesses were examined, and several letters given in evidence; and I am of opinion that the defences have not been supported by the evidence; that the proof, on the contrary, goes, in most particulars, to rebut the defences; and that in some points, where there is no evidence either way, the proof was upon the defendants.

The result of the evidence as to the right of renewal is, that the chapter never, at the period in question, refused to renew, provided application was made, or the lessee took his renewal within six months after the expiration of the seventh year; but that, if this period were suffered to elapse, the tithes would be taken into the hands of the chapter, or let to others. But that body appears more recently to have refused renewals if the lessees allowed the seventh year to expire, being desirous of obtaining possession and leasing to its own members, or to trustees for them. A concurrent lease had accordingly been granted in 1795, on the supposition that the

one in question, not having been renewed, must expire in 1798. It is plain that this is all quite consistent with the case of the plaintiff—that John Nevitt Bennett had allowed the lease to expire—and inconsistent with the defendant's statement—that he could not have obtained a renewal.

Then—there being no evidence whatever of a refusal to renew, unless we can call the letter evidence, which is without a date, and which is, after all, of equivocal import, and if not relating to the earlier period, proves nothing at all—we come to the question of Doe's incapacity. Several persons speak of that individual as of eccentric habits; so far they swear to facts; and they add, what is their belief or opinion merely, that he was of unsound mind. But if the proof were much more conclusive, it is wanting in precise reference to the period in question; and there is evidence on the part of the plaintiff which shows, that John Nevitt Bennett never thought of setting up the insanity of his companion in the lease as the reason of his having failed to obtain a renewal; nay, there is evidence that he did not allege his failure at all, or pretend that he ever had attempted to obtain the renewal. The result of the examination and cross-examination of the witnesses on this point, is, either that he had intended to let the lease run out, in order to benefit his daughters at the expense of his son; or that, having through his negligence suffered the time to pass within which he might have renewed, he contented himself with the reflection that the son only would be injured, who, he said, had enough, and that it would be

the better for the daughters: but that, whichever of these suppositions we adopt, he at any rate did state his own neglect as the cause of the non-renewal, and blamed himself, though slightly, accordingly. As for the letter of 27th November, 1784, it is of most ambiguous meaning, and may just as well fit a supposition that John Nevitt Bennett was refusing to renew upon the ordinary terms, as that he was making application, and found obstacles in his way from Doe's supposed incapacity. Taken as it stands, nothing whatever is proved by it. But it seems rather less probable that Doe's situation should be alluded to than any more common ground of difference.

But it would, according to the case of *Colegrave v. Manby*, 6 Madd. 72, and 2 Russ. 238, have been of little importance to the ultimate decision of this case, although the defendants had succeeded in showing that John Nevitt Bennett could not obtain a renewal, provided there had been a renewal afterwards obtained; and, by parity of reason, to the question of ordering an inquiry into the damage sustained it would have been of no importance, inasmuch as that damage was measured by the possibility of afterwards getting a renewal, if John Nevitt Bennett failed. The Court there held that, whether the tenant for life could or could not obtain the renewal, still he had no right to the portion of the rents and profits destined, by the condition under which he enjoyed the estate, to defray the expense of renewing.

That the plaintiff knew of the will, by having

a copy or otherwise, or that he knew of the lease and its expiration, there is no evidence at all. This is clearly not a case to which constructive notice, by joining in making a tenant to the præcipe when the recovery was suffered, can be applied, without a great strain of the principles, and a stretching of them to a use for which they never were designed. The probability is suggested of the plaintiff, who was serving his apprenticeship at Chester, four miles off, being aware of his father's having the tithes down to 1798, and no longer. This is far from an inevitable conclusion; but if it were true, does it follow that he knew, not only of his father's having had the tithes, or ceasing to have them, but of his having been lessee under the dean and chapter, and his having intended to renew his lease? The allegation of the bill, that the plaintiff knew nothing of the lease and the neglect to renew till his father's death, is well pleaded for the purposes of the suit; and if the defendants had either proved the affirmative of that negative issue, or given evidence (of which there is not a tittle) to support their opposite and contradictory averment, that the plaintiff knew of the will, then they would have stood on better ground. Nor do I consider that any thing material turns upon the plaintiff not having denied in his statement, that he knew of the will, his knowledge of which could only be important as negating his averment, that he had no notice of the lease and non-renewal.

Having gone through the evidence we are very near the end of the case; for it can never be maintained that the acquiescence of a party, under

ignorance of his rights, operates as a waiver of any claim, or as a confirmation of any thing done against him. Neither can it be seriously imagined that the proof of ignorance, or want of notice, lies on the party against whom such acquiescence is alleged ; and therefore nothing remains but the contention that by mere lapse of time, after the plaintiff attained his full age, he is barred of his remedy. As no laches after the death of the tenant for life can be imputed to him, they who set up this bar must rely upon the assumption that the doors of this Court were open to him during the subsistence of his father's life estate.

Now, first, as a defence by a trustee, this bar cannot be set up; and no more in the case of the trustee of an equity than of any other trustee. The ground of the present application to the jurisdiction is, that the rents and profits of the estate (the tithes) in John Nevitt Bennett's hands, were the property of the remainder-man, his son; that part, namely, which should have gone to pay the fine for renewal, and other expenses attending it; that part, the paying of which for those charges was the condition under which he enjoyed the residue.

Many cases have been cited upon this point which do not apply to the question. In all of them (*Harrison v. Hollins*, 1 Sim. & Stu. 471, the case of a mortgagee entering on the estate mortgaged; *Whalley v. Whalley*, 3 Bligh, 1, the case of a fraudulent purchase &c.) the act constituting the wrong or creating the equity, was complete ; the cause of action or suit had accrued ; and the party out of actual possession having his

remedy open to him at any instant of the time, the possession was equally adverse as against him and against the owner of the particular estate. In this case the matter is altogether otherwise. The quantum of damages could not be ascertained till the tenant for life died, because till then it was impossible to know what would be the residue unexpired of the lease, and the present proceeding could not have been instituted. The suit, if brought in John Nevitt Bennett's lifetime, could only have been brought either from an apprehension that he was about to suffer the lease to expire, and then the Court, upon reasonable grounds being shown by the threats or acts of the tenant for life, might have given a receiver in order to provide a fund for renewal, and might possibly have compelled him to renew; or, if he had already suffered the lease to expire, the application for a receiver might have been granted on that default; but in this case the receivership could only have been in order to provide a fund for compensation. But neither of those suits is this suit. The not having brought the former suit, indeed, goes for nothing, because the non-renewal had taken place in 1784; and even the residue of fourteen years had expired during the plaintiff's infancy. His not bringing that suit then would be nothing to the present purpose, both because he was an infant during the whole period when he could have brought it; and because, though he had been of age, it was a proceeding pointed to a remedy of a wholly different kind. After he became of age, and after the lease had expired,

his suit would have been different from the present proceeding. It may further be observed, that such a suit would have been very different from any other of which we have experience in this Court. As there was no possibility of renewal, he must have sued for a compensation, the amount of which could not be estimated—for damages, which could not in any ordinary or known course of proceeding be assessed. A calculation of the value of the life on the estate must have been made, and according as that estimate made it expire sooner or later in the seven years, more or less must have been added to the fourteen; then the present value must have been taken of that sum deferred to the period of the calculated death; and after an amount should thus have been obtained, the party called upon to pay it might, by living far beyond the calculation, have shown demonstratively that he had paid too much. It may safely be asserted that calculations of this kind are never resorted to by courts of justice, unless when the events have been such as to prevent the possibility of the fact falsifying the estimate. But if the suitor should only for the present be allowed what he might be said to have a right to at the last, viz. the fourteen years, still the period at which he should receive it must be taken into the account, and affect the calculation; and, besides, he must be told to depart, and come again for the residue of his remedy when the tenant for life should really die.

Surely it is not upon the suggestion of such

a proceeding as this having been open to the party, that we are to hold him barred by laches of his present remedy, clearly defined and well known, and easily and constantly administered,—a remedy, in truth, of a different kind from that which he is blamed for not earlier seeking.

DUMMER v. PITCHER.

THE ensuing extracts from the will, which was the subject of this litigation, will supply every thing wanting for a full comprehension of the decision.

Sir E. Sugden and Mr. J. Russell were the plaintiff's counsel. Mr. Attorney-General, Mr. Bligh, and Mr. Rudall, appeared for the defendant.

“I dispose of all my worldly estate as follows :—First of all, I give my leasehold house and premises, situate in South Street, also my leasehold house and premises in Curzon Street, also my leasehold house in Chapel Street, and likewise my leasehold house in Henrietta Street, and all the rents and proceeds of the aforesaid four houses, together with all the interest of all my funded property or estate of what kind soever or wheresoever the same or any part thereof may be found, to Samuel Dummer and William Thomas Sweet, upon trust, and to the intent and meaning that the said Samuel Dummer and William Thomas Sweet do and shall from time to time, and at all times hereafter, pay the net rents and issues of the aforesaid four houses and premises, and also the interest, proceeds, and profits of all my funded property, and all my estate, of whatsoever kind, as soon and as often as the same or any part thereof may become due and payable, into the hands of my wife Mary Cass, for her own proper use and benefit, for and during her natural life, or permit her to receive the same for her sole use and benefit; and from and immediately after the death of my said

wife, then I give and bequeath in manner following; that is to say, first, to my nephew Joseph Pitcher, senior, I give and bequeath the sum of 300*l.* stock four per cents., together with my leasehold house and premises situate and being in Henrietta Street aforesaid. Also I give, &c. —. Also I give and bequeath to my two sisters-in-law, Ann Morton and Margaret Webb, an annuity of 50*l.* each; and the survivor of them the said Ann Morton and Margaret Webb shall and may have the whole annuity of 100*l.* during her natural life; and after the death of both my sisters-in-law, Ann Morton and Margaret Webb, I then give, and my will is, that the one moiety of the principal sum of 2000*l.* from which the annuity of 100*l.* proceeds, go to the children of my niece Mary Ann Dunmer, or their heirs, share and share alike; and the other moiety of the aforesaid principal sum of 2000*l.*, after the death of my said two sisters-in-law, is to go to the children of my nephew Joseph Pitcher, senior, born by his first wife Elizabeth Pitcher, share and share alike, or to their heirs in like manner. Also I give the sum of 500*l.* stock four per cents. to my great nephew Thomas Cass Pitcher; but if the said Thomas Cass Pitcher should die single, or without issue, I then give, and my will is, that the said sum of 500*l.* herein willed or bequeathed to him said Thomas Cass Pitcher as aforesaid, shall then be equally divided between his said Thomas Cass Pitcher's two brothers, Joseph Pitcher, William Pitcher, and his sister Mary Boyden Bevis, or the survivor of them and survivors, share and share alike, or their heirs or assigns. Also I give, &c. &c. —. All the rest, residue, and remainder not hereby before willed, I give to the aforesaid Thomas Cass Pitcher, and the aforesaid Mary Ann Dunmer, that may be found of my estate; and I, the testator, Thomas Cass, do nominate, constitute, and appoint the said Thomas Cass Pitcher and the said Mary Ann Dunmer for my sole executor and executrix to this my will and testament."

Dec. 16, 1833.

Testator transferred all his stock into the names of himself and his wife, and about three years afterwards

LORD CHANCELLOR.—Thomas Cass, the husband of Mary, between whose personal representative and Thomas Cass Pitcher the present question arises, had, between two and three years

before the date of his will, which was July 19, 1814, transferred 2000*l.* five per cent. stock, and 2500*l.* four per cent. stock into the joint names of himself and his wife; and after that date he purchased three smaller sums of stock, amounting to 400*l.*, in their joint names, and died in 1817. By his will, he gave to Samuel Dummer and William Thomas Sweet all his leasehold houses, and the rents thereof, and the interest of his funded property, upon trust, to pay such rents and interest, and those of all his estate, to his wife for life; and after her decease he gave sundry legacies of four per cent. stock, and he gave one of the leasehold houses; he also gave to his sisters-in-law, Ann Morton and Margaret Webb, an annuity of 50*l.* each, and the survivor was to have an annuity of 100*l.*; and after their deaths, he gave a moiety of the principal sum of 2000*l.*, out of which the said annuity was to proceed, to the children of his niece, Mary Ann Dummer, and another moiety to the children of his nephew, Joseph Pitcher, senior. He also gave the sum of 500*l.* stock, four per cents., to his great nephew, Thomas Cass Pitcher, and if he should die single, or without issue, he gave the same between his two brothers and his sister; and after bequeathing other legacies, he gave the residue of his property to the said Thomas Cass Pitcher and Mary Ann Dummer, and appointed them executor and executrix of his will. After his decease the wife received the rents and interest of the whole of the testator's estate; which, the leases having no long time to run, ex-

made his will, bequeathing his funded and other property upon trust for his wife for life, and after her death to pay certain stock and pecuniary legacies, and also certain annuities. The testator, after having made his will, purchased other stock, and transferred it into his own and his wife's names; and when he died he had no funds except what had been so transferred by him as aforesaid, and his personal estate was insufficient for the purposes of his will.

Held, nevertheless, that the wife took all the stock by survivorship, and that the will did not admit of a construction putting her to her election.

Inadmissibility of evidence extrinsic to a will for explaining its meaning in order to raise a case of election.

Observation upon the cases in which it has been determined that powers were executed by wills, containing no notice of them.

clusive of the sums of stock, (which at his death still continued in the joint names of himself and his wife,) was of very little value, and was not, together with those sums, more than sufficient to pay his debts and legacies, and perform the trusts of his will. The widow upon one occasion lent Thomas Cass Pitcher 500*l.* money (the proceeds of the sale of part of the four per cent. stock) upon his promissory note. He says this was an arrangement between the widow and himself for giving him the legacy to which he alleges he was entitled under the testator's will, and reserving to her the interest of the money. This however is not proved; the mere giving of the note precludes such a supposition if it rests on suggestion only; and the sums do not tally, the legacy being 500*l.* stock, the loan 500*l.* money. The widow having died in 1830, leaving Mary Ann Dummer her general and residuary legatee, the bill was filed by her husband and herself to have the stock standing in the joint names of the testator and his wife declared to be the property of the wife surviving, and not subject to the trusts of the husband's will. The legatee, Thomas Cass Pitcher, contends, and he has filed a cross bill praying that it may be declared, that the funded property was assets for the payment of the testator's legacies; or, if it survived to the widow, that she was bound to elect, and had elected to take under the will. The Vice-Chancellor decreed that the stock survived to the widow, and that she was not put to her election; and I agree with his Honor in this opinion, upon both points.

1. When an individual effects a purchase of

stock in the joint names of himself and his child, or of himself and his wife, the transaction cannot of itself be considered as converting those parties into trustees, quoad their interest, for the purchaser whose money paid the price of the stock. In regard to a child, this is, I think, admitted. But it is said that the case of advancement to a child rests upon the peculiarity of the relation, and that the exception shall not be extended to the wife. That distinction, however, is not supported by the authorities. Lord Eldon, who, in *Rider v. Kidder*, 10 Ves. 360, had only expressed the inclination of his opinion, saying that the relation would perhaps also prevail in favour of a wife, had apparently no doubt at all in *Wilde v. Wilde*, in 1823, reported in the 2d edition of Mr. Roper's Treatise on the Law of Property between Husband and Wife, vol. 1, p. 54; but held a purchase of stock in the joint names of husband and wife to be *primâ facie* a gift to the surviving widow, unless evidence of cotemporaneous acts raised the presumption of a contrary intention. Lord Hardwicke too, in *Stileman v. Ashdown*, 2 Atk. 477, though he expresses an opinion that the doctrine in favour of advancement of children had gone full far enough, refers to the case of *Christ's Hospital v. Budgin*, 2 Vern. 683, for another purpose indeed, but with the full view of the favour therein given to the wife as against volunteers or the heir at law; and without any disapproval of Lord Harcourt's decision, a part of which he makes the ground-work of his own. It is almost unnecessary to add, that where, as is the case here, with respect to the

bulk of the stock, the whole standing in the joint names at the date of the will, there has been a transfer into the joint names of former purchases previously standing in the buyer's own name, the presumption of intention to give is considerably stronger. Indeed in *George v. Bank of England*, 7 Price, 646, Chief Baron Richards held that such a circumstance would be sufficient in the case of a stranger. It was further contended that the testator's power over this chose in action continuing after the transfer, and up to his death, differs the case from that of advancement to a child; but there is a great fallacy here, as it seems to me. The testator's power may have continued, but in what capacity? As husband, and in the exercise of his marital right. Then suppose we admit that he might have reduced the stock, a chose in action, into possession, by having re-transferred it during his lifetime into his own name, we still do not at all advance the argument; for it is not pretended that any thing was done; the stock stands in the wife's name at the date of the will, and at the death of the testator. The husband makes the will, which, it must not be altogether forgotten, it is denied relates to the stock. But suppose, with a view to this part of the argument, we were to admit that it did,—the wife's right would survive nevertheless. I have no doubt whatever, therefore, that the stock survived to the wife; and then the second question arises of her election.

2. There is nothing more undoubted in the law than, that, to make a case of election, the intention must appear certainly and clearly, both as to the

property assumed to be disposed of, and as to the implied condition to fulfil. A person is not, without strong indications of such an intent, to be understood as dealing with what does not belong to him. As for his supposing himself to have rights which he has not, unless it so appears plainly upon the face of the will, it would be most dangerous to be guided by any conjecture we may raise to this effect, or to let in extrinsic evidence in proof of it. "If I was to receive evidence of the testator's fancy, it would introduce a very desperate rule of property in this Court." These were the words of Lord Thurlow in a case (*Stratton v. Best*, 1 Ves. jun. 285,) where nevertheless he stated that he had no doubt of what answer the testator would have given if the question had been put to him as to his intention. I do not, however, feel that I am called upon here to determine whether or not evidence dehors the will is admissible to explain the testator's meaning, in order to raise a case of election. There is some discrepancy among the cases, one or two of them not being reconcileable with the others, and, I may add, with the established principles of the law. But I entertain the strongest opinion, referring to those others, and to the observations of Lord Kenyon in *Andrews v. Emmot*, 2 Bro. C. C. 297, and of Lord Eldon in *Druce v. Denison*, 6 Ves. 385, and *Pole v. Somers*, *ibid.* 309, in this Court, and *Doe v. Chichester*, 4 Dow. 65, in the House of Lords, that the rules of law are against its admission. Read also the judgment of Lord Manners in *Judd v. Pratt*, 13 Ves. 168. Its admission here, however, would not decide

the question. Have we any right to say upon this will, that the testator has given the stock which it has been proved was not his own to dispose of? The general gift to trustees, after specifying the leaseholds, is of all the interest "of all my funded property or estate of what kind soever, or wheresoever the same or any part thereof may be found." This of itself is sufficiently general, and extends to every thing else as well as funded property. But that this generality was clearly in his intention is plain from the introductory part of the devise, where he says, that he disposes of "all his worldly estate as follows:" and then comes the bequest of the leaseholds by their description; and the general words about funded and other estate close the devise. The stock legacies, it will be noticed, are every one of them general; they are legacies of the sum of so much and such a stock. Thus the one in question is, "I give the sum of 500*l.* stock, four per cent., to my nephew; and if he die single, or without issue, the said sum of 500*l.* to go over to his brothers and sister." There is nothing here to make it clear that the testator was dealing with the stock already purchased, or which should thereafter be purchased. On the contrary, the legacy is plainly, by all the rules on the subject, a general one. But it is contended that in deciding upon the character of the ulterior legacies we must refer to the preceding general gift to the trustees, and to the life interest given to the widow, after whose decease these legacies are to take effect. This only brings it back to a clause of a nature as general, "all my

funded property and all my estate." But there is nothing to justify us in holding that the testator thereby intended to give what was not his own, viz. the stock in which his wife had the interest by survivorship, not to be defeated by his will. We may very possibly think, as Lord Thurlow did in one of the cases, that, had the testator been asked the question, he would have said that the stock was his, and that he intended to deal with it as such. But he has not made that intention clear, where it ought to be shown, in his will.

The bearing upon this question of the cases upon the execution of powers appears to be all one way, if regard be had to the well-established distinction between those respecting personalty and those operating on real estate. Where a testator has no real estate, save the one comprised in the power, a general devise will operate as an execution, on the ground that there is no other way of satisfying the words of the devise, except by supposing the deviser to have had the power present to his mind; and upon that principle *Standen v. Standen*, 2 Ves. jun. 589, and other cases, were decided. But a will of personalty looks forward to the testator's death, and acts upon what he then may have, as well as on what he has at the date of the will; and therefore general words, though large enough to cover the personalty subject to the power, do not execute it; for there is no necessity, as in the case of realty, to suppose the testator intended an execution of it, merely because

he had no other personalty at the time; he must be taken to look forward, and bequeath all that his will can affect. These points are so well established, that one is only apprehensive of seeming to consider them as unsettled by referring to the cases, from *Andrews v. Emmot*, downwards to *Jones v. Tucker*, 2 Mer. 533, in which Sir William Grant admitted that there could be no reasonable doubt of the intention to execute the power, but yet held himself bound by the rules of law, and precluded from looking out of the will to the state of the personal property at its date.

In this case, the testator may have intended to dispose of personal funds to be afterwards acquired; and therefore we are not driven to assume that he was speaking of such stock as stood in the joint names of himself and his wife at the time when the will was made.

The decree below must therefore be affirmed.

PELL v. STEPHENS.

THE judgment recapitulates the facts.

Mr. Pepys and Mr. Koe moved. Mr. Wigram and Mr. Blunt opposed.

Dec. 20, 1833.

It is no ground for restraining a mortgagee from enforcing his security at law, that he has contracted to buy from the mortgagor another estate, from the purchase money for which the mortgage debt is to be deducted.

LORD CHANCELLOR.—A., assignee of B., a bankrupt, gives an undertaking to C., a mortgagee of B.'s estate of Blackacre, and who, for arrears, had put in an execution or distress (it is not clear which), and had a man in possession, that if C. would give up possession, he, A., would indemnify him to the amount, which was 350*l*. The

undertaking is given as assignee, and is to indemnify C. out of the sale of the effects taken possession of by C. C. gives up possession upon this undertaking, thus executing the consideration on his part. The fiat under which B. was made a bankrupt is then annulled, and A. never obtains any of the effects at all. But the Court of Exchequer have held the undertaking to be personal, and C. has recovered against A. to the amount. A. now files his bill for an injunction to stay execution, and beside the above matters, upon which it is not contended he could rest his claim to the assistance of this Court, he further states that, before the bankruptcy, B. and C. had executed an agreement for the sale by B. to C. of B.'s other farm of Whiteacre, and that C. was to be at liberty to deduct from the purchase money for Whiteacre, the amount of the mortgage money on Blackacre. One of the parties asserts, and the other denies (in his answer), that the delay in completing the purchase has been owing to C., who asserts that there is a defect in the title.

If an injunction be granted on such a ground as is here stated, is not this the consequence, that the mortgagee of any estate, by agreeing to become the purchaser, abandons his right to sue at law upon the specialty, until an account can be taken between him and the mortgagor as vendor, and thus hangs up his rights under the mortgage, to abide the event of a suit which may arise upon the agreement to purchase, or, at all events, to wait until a good title can be made? whereas his rights as mortgagee, or on the specialty, are quite

independent of the question of title. But here the case is stronger, for the mortgaged premises are Blackacre, and the premises agreed to be purchased are Whiteacre ; so that the rights of the mortgagee of the former are to be hung up on account of the difficulties arising as to the title to the latter. The injunction is chiefly asked on account of this agreement to purchase, and on the ground that A., by his undertaking on which he has been sued at law, has become a surety for B., and is entitled to stand in his shoes, and to have the benefit of all his equities as against C., the purchaser from B. of the one estate, and mortgagee of B. of the other, and it is not necessary to dispute that he may be taken to be such surety, and to have such equities as B. would have ; because, for the reason which I have given, B. himself would not have the right contended for.

The motion must therefore be refused ; but not on the ground to which reference was at first made by me when I heard the case stated, namely, that for any thing I could see there might be relief at law, and therefore the argument here was concluded. I desired a note of the argument in the Exchequer to be furnished, but I have not been able to obtain it. I have, however, considered the point, and I think there can be no doubt that the decision which that Court pronounced on the demurrer in the action was right. It is true that the party agreed as the assignee of the bankrupt, and, what is stronger, he agreed to pay out of the effects, or sale of the effects in execution, or under distress. But the

other party immediately performed the consideration of the agreement on the faith of the undertaking, by abandoning the goods of which he had possession, and he has a good right to be placed in the same situation in which he stood before he gave up the possession. The undertaking must be construed as not only guaranteeing the value of the goods; but, if necessary, it must be construed as a guarantee for working out the other party's remedy. It must be construed as a guarantee, that he who gave it had such a character as he assumed, namely, that he was truly and rightfully the assignee, and that he had the right to the goods out of which he was to furnish the indemnity; in other words, he must be taken to have guaranteed his own title, that is, the validity of the fiat, of the frailty of which he must also be taken to have been conscious. A person may bind himself for the act of another, or to pay out of a fund not his own, and will be liable in either case. There is a decision in the King's Bench, *Eaton v. Pell*, 5 Barn. & Ald. 34, as strong in principle as this, and stronger by a good deal in its application to the present case, than *Appleton v. Binks*, 5 East, 148, and the other cases which are said to have been referred to in the Court of Exchequer. There was, therefore, no relief at law; and if the party applying here had an equity to be relieved, he could not be met by the argument that the Courts of Law were open. But I am of opinion that he has no such equity, and the motion must be refused.

The case is in some respects a hard one, but

the hardship is not as between the plaintiff and defendant, but the plaintiff and a party not in Court, the bankrupt, now no longer such, against whom he has his recourse, although possibly it may avail him little. The costs therefore must be given to the defendant on refusing this motion.

WALBURN v. INGILBY.

A BILL was filed against all the directors of an unincorporated joint stock company, called the Potosi la Paz and Peruvian Mining Association, except one Hunter, who had become a bankrupt, and it charged them with fraud, and sought to make them answerable for a sum of 40,000*l.* and upwards. The plaintiff was a shareholder, and the bill stated that he had purchased at various times 2000 shares, upon which he had paid an instalment of 5*l.* per share, and that he had ever since been, and then was, the holder thereof. The prospectus for the formation of the company was set forth in the bill, and it appeared therefrom that no transfer of shares was to be valid at law or in equity, unless the purchaser should have been approved of, under the authority of a board of directors, and should have executed a proper instrument to bind him to the observance of the regulations of the association. Some of the plaintiff's shares were not original. The case came before the Court in three several stages.

First stage : Several of the defendants put in a demurrer for want of equity, which was rested on the ground that although the 18th, 19th, and 20th sections of the 6 Geo. 1, c. 18, (the Bubble Act,) relating to projects, were repealed by the 6 Geo. 4, c. 91, yet that those sections were only declaratory of the common law, and that such associations are consequently illegal; and also that the bill did not pray a dissolution of the partnership. There was, besides a demurrer *ore tenus*, that neither the assignees

of Hunter nor the other shareholders, and especially those from whom the plaintiff bought his derivative shares, were parties.

Upon this demurrer the Lord Chancellor, in December, 1832, pronounced the following judgment:—

I AM of opinion that this demurrer must be allowed. If I had only agreed with the defendants in the point made of the company being illegal at common law, independently of the 6 Geo. 1, now repealed, or had thought that question doubtful, I might have been disposed to let the case proceed, by disallowing the demurrer, and suffering the point to be afterwards raised and decided. Had the demurrer rested there, however, there seems to be no reason for allowing it. To hold such a company illegal, would be to say that every joint stock company not incorporated by charter or act of parliament is unlawful, and, indeed, indictable as a nuisance, and to decide this for the first time, no authority of a decided case being produced for such a doctrine. The clause intimating that each subscriber is only liable to the extent of his share is not enough to make the association illegal; such a regulation is wholly nugatory, indeed, as between the company and strangers, and can serve no purpose whatever, unless to give notice. In that light it is not to be viewed as criminal or as a means of deception; for the publicity of it may tend to inform such as deal with the company, and a proof of that publicity in the neighbourhood of parties so dealing might go to fix them with notice. For any other purpose of restricting the liability of the shareholders, it would plainly be of no avail; and whosoever became a subscriber upon the faith of the restricting clause, or of the limited responsibility which that holds out, would have himself to blame, and be the victim of his ignorance of the known law of the land.

On this ground, then, I do not think the demurrer can be sustained. Nor do I think it can be sustained upon the other ground, that the bill does not pray for a dissolution of partnership; for this is no suit for a general account, but only a complaint of a fraud. Neither can it be held demurrable on account of the non-joinder of Hunter's assignees as defendants, for the defendants were severally liable; nor on account of the other shareholders not being made parties, after the decision of Lord Lyndhurst, in *Hichens v. Congreve*, 4 Russ. 562, acted upon, as I have understood, more recently in *Small v. Attwood*, 1 Younge, 407; to say nothing of cases where the making all partners

Dec. 12, 1832.

Joint stock companies not illegal because not incorporated.

A bill by a shareholder in such a company against the directors, charging them with fraud, &c. needs not pray a dissolution of the partnership, nor needs it make the other shareholders, nor the assignees of a bankrupt director, parties.

The shareholder in the company in question ought, looking at its rules, to have set forth more explicitly how he derived his title, and a demurrer for want of equity was therefore allowed. It seems, looking also at such rules, that the persons from whom he bought shares should have been parties.

parties has been dispensed with, in companies of which the shareholders are so numerous as to render that impossible, or at least highly inconvenient.

But there is one ground of demurrer which I cannot get over. The plaintiff alleges his title to be as a shareholder by purchase, and he does not set forth how. He does not derive his title. He merely says that he purchased for valuable consideration divers shares, upon which the instalment of 5 per cent. had been paid, and that he ever since has been, and now is, the holder of such shares. Now in another part of the bill it is alleged, that by the rules of the association, as set forth in the prospectus, no transfer of shares could be valid in law or equity, unless the purchaser was approved by a board of directors, and signed an instrument, binding him to observe the regulations. Is this merely directory or is it a condition precedent? I am of opinion that it is a condition precedent, and that the performance of it should have been alleged. A demurrer, it is true, admits all facts that are well pleaded; and it is contended, that here the allegation of the plaintiff having purchased shares and being a shareholder is admitted, and that therefore the rules must be assumed to have been complied with. Nothing to the contrary appears on the face of the bill, to which of course we are confined. This, however, depends wholly upon the purchase and holding of the shares being well pleaded. But share-holding is not sufficiently known in the law to make the mere allegation of it intelligible without more. Nor are shares, or the purchase of shares, things known in law. The shares may be any thing, and may be quite different in different companies; the modes of holding them may be divers. The manner of transferring them may be indefinitely varied, even where the interest is one recognized by law, and the thing is well known; as in the case of the transfer of a bill of exchange, which is a transfer of a chose in action legalized by express enactment, or the case of an assignment of a reversion at law, the title of the plaintiff must be set forth specially, and if there be any conditions precedent, the performance of them must be alleged.

Even if the demurrer on this ground should be overruled, upon the argument that it was sufficient to allege the share-holding, the defendants would only be driven to raise the same question in a different shape by pleading. But as I have no doubt

that the allegation here is imperfect, and consequently the shareholding not admitted by the demurrer, I must consider the case on the omission of the material affirmation that the condition precedent had been performed, and it therefore stands that the plaintiff has not alleged any title. The demurrer is perhaps sustainable upon the other ground,—that those from whom the plaintiff bought have not been made parties. But into this there is no occasion for entering, as it was not set down among the special grounds of demurrer.

Second stage: Four of the defendants, Messrs. Tennyson, Russell, Lousada, and Thiselton, having, previously to the filing of the demurrer, put in an answer, to which was annexed a schedule of documents, admitted to be the joint property of themselves and the other directors, and to relate to the matters of the suit, and stated to be in the custody of the solicitor of themselves and other directors, who had, since the allowance of the demurrer, instructed him on no account to produce the same. A motion was made for the production thereof in the usual way, and an order to that effect was pronounced by the Vice-Chancellor: which order the Lord Chancellor, upon an application made in June, 1833, refused to discharge, upon grounds fully set forth in the ensuing judgment.

Third stage: The above-named defendants, Tennyson, Russell, Lousada, and Thiselton, having appealed to the House of Lords, a motion was made to stay the execution of the order to produce the above-mentioned documents.

For the motion, the Attorney-General and Mr. Wigram. Against it, Sir E. Sugden.

LORD CHANCELLOR.—This was a motion to stay, pending an appeal to the House of Lords, the execution of an order obtained on the 20th June last, calling upon four of the defendants,

Dec. 20, 1833.
It is no sufficient objection to an application for the inspection of documents relative to the

matters of the bill, that they are in the hands of a solicitor, who holds them not only on the behalf of the defendants, but also of other persons no longer parties to the suit, who have a similar interest in the same, and have prohibited any production.

Neither is it a sufficient objection to such an application, that it has become manifest the plaintiff can never succeed in his cause.

Irreparable mischief, not in general a reason to stay proceedings pending an appeal to the House of Lords.

The imperfect constitution of the appellate jurisdiction in a great measure renders appeals nugatory.

Messrs. Tennyson, Russell, Lousada, and Thiselton, to produce and give the plaintiff access to the books and papers, a list of which is set forth in a schedule to their answer, and admitted by them to be in the possession and custody of Mr. Gregson, who is also admitted by them to be their solicitor. It is further admitted by them that those books and papers relate to the matters in the plaintiff's bill. Thus far, then, there seems nothing more of course than the granting of the usual inspection. But it was resisted upon the ground that three of the other defendants had demurred to the bill; that their demurrer had been allowed some months before the order was made; and that Mr. Gregson held the documents in question for them as well as for the defendants who had answered, and against whom the application was made. It is however to be observed, that not one of the defendants who resist the production takes upon himself to swear absolutely that he has not the power of producing. What they state is as if a party were to say, he could not produce papers because they were in his solicitor's hands,—a statement which plainly could not protect him. The answer of the defendants states that Mr. Gregson has the custody as their solicitor, as well as the solicitor of other defendants; and their affidavits state that they are in his custody, he being their solicitor in the cause, as well as the solicitor of others whose demurrer has been allowed, and that he, Mr. Gregson, objects to produce them, on account of a notice given him by two of the defendants who had demurred; and so, argumentatively, and by way of inference, and under

the circumstances the parties swear they are unable to produce them. An affidavit to the like effect was also made by Mr. Gregson, admitting he held the documents as solicitor in the cause for all the parties, as well for those who continued such, as for those whose demurrer had been allowed. It is also sworn that some of the latter have other solicitors in their employ besides Mr. Gregson; and through those other solicitors they gave Mr. Gregson notice, as their solicitor, not to produce the documents. If such a defence, or such an arrangement among parties having a common interest in books and papers, were allowed to protect them against production, it is clear that means would never be wanting to evade or to defeat the jurisdiction of the Court. The whole affair has the appearance essentially of a contrivance for this purpose, and it never can be suffered to prevail. One party elects to demur; another thinks it for his advantage to answer; both employ one solicitor in the cause, and he holds the documents relating to it for both; but the demurring party employs another solicitor to give his solicitor in the cause notice not to produce these; and the party answering says that his co-defendant being no longer a party, his private solicitor has given notice to the common solicitor not to produce the papers which are their common property, and to which both have the same title. Such an excuse cannot be admitted. The Court has a right to give whatever access the party himself is entitled to; and as Mr. Gregson could not refuse access to the defendants who have answered, so cannot they refuse

access to the plaintiffs. With respect to Mr. Gregson, he is quite safe in acting as the order of the Court has called upon his clients to do and to permit. It is said that no decree can ever be made in this cause; that the suit can never be prosecuted with effect against the parties who resisted the application, or against any of the defendants, on account of the demurrer having being allowed. Admitting it to be so, and supposing it to be impossible that in this case the bill might be demurrable for want of equity as against some parties yet not as against others—still that is no reason for refusing the production. The argument is not valid, that because, the papers being seen by a plaintiff, he will nevertheless fail in his suit, therefore he shall have no inspection of them.

But we are here not strictly speaking upon the merits of the motion granted in June; we are upon application to stay execution of the order then made. It has, however, been frequently said by the Court, that these applications are in the nature of re-hearings. It has also been observed, and justly, that they are not to be encouraged, because they are re-hearings without the ordinary securities and checks. This at least may safely be stated, that unless there seems strong ground for supposing that the judgment will be reversed, and a suggestion be made of remediless mischief, the execution ought not to be suspended.

It is accordingly said here, that unless the suspension is granted the appeal will be useless. But that is by no means correct. If the evidence is now obtained by the plaintiff under the order, and it is afterwards decided that the order ought

not to have been made, the evidence so obtained will go for nothing; it cannot be used. The Court would suspend the execution of decrees and orders in very many of the cases decided, were the argument of irreparable mischief to prevail. In cases of injunction, for instance, an appeal ought to stay execution; and still more in orders dissolving injunctions. Suppose an appeal against the order to pay money into the hands of a party, a foreigner, for instance, about to quit the country. I put the case of an order made upon the motion heard yesterday, and an appeal from that order (a). That would be a far stronger case than the present; and yet if in that case the application were granted, it would really amount to deciding the matter the other way; it would be all the party opposing had contended for; it would give him the very stop on the fund for which he had in vain been struggling, and expose his adversary to the delay against which he had successfully striven; it would be a reversal of the decision under the form of staying execution. For it is unnecessary to remark how inevitably an appeal would follow in all such cases, when it afforded the means of frustrating what the Court had determined. Accordingly such applications are uniformly discouraged. In *Huguenin v. Basely*, 15 Ves. 180, Lord Eldon says, that encouraging them

(a) The order here alluded to was afterwards made in the suit of *The King of Spain v. Machado*, and as it liberated a very large sum of money, it occasioned, as the Lord Chancellor had anticipated, an immediate application to prevent its being carried into effect, on the ground of an appeal having been brought. The application was refused, for reasons similar to those above stated, and the appeal, it is believed, was never prosecuted.

would palsy the arm of justice; and though in that case he made the order in the special circumstances, and because it could not produce serious inconvenience, yet in another, *Willan v. Willan*, 16 Ves. 216, he refused the application with costs, although it was clear that change of possession was the consequence of the refusal, and that if it had been granted the party's enjoyment would only have been postponed. In one of the cases the Court referred to the well-known instances of convictions, where the stay is refused from regard to the evil of breaking in upon the general rule; and notwithstanding the admitted mischief that must arise in particular cases; *Clapham v. White*, 8 Ves. 35.

It has been said more than once in this place, that such applications are better made in the House of Lords; and in one of the cases Lord Eldon treated their bringing the matter before him as a misapprehension of the party's proper course, on the ground that his order refusing to stay might itself be appealed from, and so on without end. He gives this other reason, that the Court of Appeal has the power of protecting the party in possession of the judgment against any vexatious delay consequent upon the stay, by advancing the cause where it has been deemed fit to grant the application. In the present case the appeal was entered a month after the order, and the House of Lords sat six weeks later. But leave was obtained not to lodge the cases till after the end of the session. That in a question of this sort,—where every thing must needs have been in perfect readiness, and the case consisted necessarily

of a transcript of parts of the pleadings and of the affidavits, with about twenty lines of reason annexed,—I say that in a question of this sort there could have been any difficulty in lodging the cases and applying to have the hearing advanced, seems inconceivable.

I had every inclination originally to grant this application, and if, on conferring with others whose experience gave great weight to their opinions, I had found any doubt whatever entertained upon the matter of the order, or of this motion, I should probably have stayed the execution. But even then I am not sure that I should have done right; for certainly it would be giving encouragement to vexatious appeals upon a large portion of the business which occupies these Courts. Indeed were this motion granted upon the allegation that refusing it will enable a party to do something which cannot be undone, or to obtain some advantage which can never afterwards be wrested from him, it is impossible to conceive any case of an order to pay money out of Court—to dissolve an injunction—to appoint a receiver—in which, the same ground existing much more plainly, the same course must not be pursued. And thus the very cases where it is of the most essential importance that speedy execution should take place—the very cases in which this Court is endowed with its peculiar jurisdiction because of that urgent necessity—will be those in which the argument for suspending execution will be the most powerful. In other and better words, in the language of Lord Eldon, the arm of the Court will indeed be palsied.

It is needless to observe, that the inconvenience which must be admitted to attend this principle, and in a great measure to render appeals nugatory, may be traced almost in the whole to the imperfect constitution of the appellate jurisdiction. If that were so constructed as to give instantaneous dispatch, then, under proper regulations (for even then some restraint would be necessary), execution might generally be stayed pending the appeal. The difficulty would here be justly to arrange those regulations, so as to prevent appeals being resorted to in all cases, and the Courts below being made merely stages for carrying causes to the last resort. But whether an appellate Court is ever likely to be obtained so constructed as to ensure such immediate dispatch, and at the same time so composed as to obtain full confidence for its decisions, is another and more serious question, upon which this is no place or time to enter.

I therefore feel it to be absolutely necessary that this motion should be refused, and with costs (*a*).

(*a*) The following is an extract from the minute books of the House of Lords, and shows what became of this case there:—

“ 1833. July 25. Appellants (Tennyson, &c.) ordered to enter into recognizances.

August 1. Answer brought in.

22. Petition of appellants for time to lodge cases.

24. Two months allowed.

1834. Feb. 25. The appeal having been dismissed for want of prosecution, respondent petitioned for his costs.

March 3. Counter-petition of appellants.

25. Appellants ordered to pay 150*l.* costs, being those incurred before 14th January last.”

KING v. HAMLET.

THE plaintiff, who was the eldest son of Viscount Lorton, purchased in 1828 of the defendant, a jeweller, goods to the amount of 8000*l.* in order to raise money by the resale, and executed a mortgage of certain estates, which he was entitled to in remainder, for securing the price. To this transaction the defendant alleged that Lord Lorton was privy. After some manifestation of an intention to annul the bargain, a bill having been filed in 1829 for that purpose, but soon afterwards abandoned, the goods were disposed of and produced less than 3500*l.*, and then the present suit was instituted with a similar object, and an interlocutory injunction was granted by the Vice-Chancellor to restrain the defendant from enforcing his security at law, and which injunction the Lord Chancellor upon appeal refused to dissolve. Issue was thereupon joined in the suit, and both parties took the depositions of witnesses; the design of those taken on the defendant's part being principally to show Lord Lorton's knowledge of the dealing; and the cause was now by special leave heard before the Chancellor.

Mr. Attorney-General, Sir E. Sugden, and Mr. J. B. Parry for the plaintiff. Mr. Pepys, Mr. Knight, and Mr. Stuart for the defendant.

LORD CHANCELLOR.—If the question which was before the Vice-Chancellor, and came afterwards upon appeal before this Court, in 1831, upon the injunction, be now re-considered, with the additional evidence derived from the depositions in the cause, it will still appear that the injunction was rightly granted upon the facts then before the Court; but that the case, in se-

repudiated the bargain made, nevertheless act upon it, it lies upon him to prove that he did so under the continuance of the same distress which gave rise to the original dealing.

It is not a usurious transaction to sell goods charged at the shop prices upon a security bearing interest, although with knowledge that the same are bought for the sole purpose of raising money by an immediate resale.

Dec. 20, 1833.

The extraordinary protection granted by the Court in cases of expectant heirs must be refused should it appear that the transaction was known to the person standing in loco parentis.

Should the expectant heir, after having

veral material respects, stands at the hearing in a different position. Both his Honor and myself then considered that there was no proof of Lord Lorton's privity to the transaction; that the probability was against Mr. Hamlet having made any effectual communication to his lordship, or those acting on his part; and that, as the proceedings in the bill first filed by Mr. King, the bill of 1829, could not be effectually prosecuted from his distressed circumstances, his dropping it, instead of obtaining back the goods from Mr. Robins, and then keeping them till he should by means of the suit compel Mr. Hamlet to receive them, was sufficiently accounted for. All these things stand very differently now upon the evidence; and it may be added, that there is also some addition to the proof of adequate value. Upon this last point, however, I place the less reliance, because the other grounds appear sufficient to dispose of the question.

Two propositions I take to be incontestible, as applicable to the doctrines of this Court upon the subject of an expectant heir dealing with his expectancy, and as governing more especially the present question.

First: That the extraordinary protection given in the general case must be withdrawn, if it shall appear that the transaction was known to the father, or other person standing in loco parentis; the person, for example, from whom the spes successionis was entertained, or after whom the reversionary interest was to become vested in possession; even although such parent, or other

person, took no active part in the negotiation, provided the transaction was not opposed by him, and so carried through in spite of him.

Secondly : That if the heir flies off from the transaction, and becomes opposed to him with whom he has been dealing, and repudiates the whole bargain, he must not in any respect act upon it, so as to alter the situation of the other party or his property ; at least, that if he does so, the proof lies upon him of showing that he did so under a continuing pressure of the same distress which gave rise to his original dealing. Still more fatal to his claim of relief will it be if the father, or person in loco parentis, shall be found to have concurred in this adoption of the repudiated contract. Either of these propositions would be decisive of the present question, if the facts allow of their application to it, and if they are well founded in law. I shall examine each of them in both respects.

1. The whole doctrine of expectant heir assumes, that the one party is defenceless, and exposed unprotected to the demands of the other, under the pressure of necessity. It would be monstrous to treat the contracts of a person of mature age as the acts of an infant, when his parent was aware of his proceedings, and did nothing to prevent them. The parent might thus lie by, and suffer his son to obtain the assistance which he ought himself to have rendered, and then only stand forward to aid him in rescinding engagements which he had allowed him to make and to profit by. If you look at all the cases, from the time of Lord Nottingham downwards, you will

find no trace in any one of the father or other ancestor's privity; on the contrary, his ignorance is always assumed, as part of the case, where the subject is touched upon, and its being so seldom mentioned either way, shows clearly that such privity never was contemplated. This circumstance is, however, several times adverted to in a manner demonstrative of the principle. In *Cole v. Gibbons*, 3 P. Will. 290, the ground of this whole equity is said by Lord Talbot to be the policy of the law to prevent the heir being seduced from a dependence upon the ancestor, who probably would have relieved him. In the same spirit Lord Cowper had before, in *Twisleton v. Griffith*, 1 P. Will. 310, given as one effect of the law, its tendency by cutting off relief at the hands of strangers, to make the heir disclose his difficulties at home. So in *Chesterfield v. Janssen*, 1 Atk. 301, Mr. Justice Burnett (p. 339) treats such transactions as things done behind the father's back, and, as it were, a fraud upon him; a view of the subject, adopted also by Lord Hardwicke in the same celebrated case, pp. 353, 4. It is as well to mention those cases, because there has been no decision upon the point; but it seems quite a clear one, and only new because the facts never afforded a case for decision, the proposition having apparently never been questioned.

We are now to see what evidence there is of Lord Lorton having been conusant of the transaction in question; and here the proof lies upon the defendant. He must satisfy the Court that there was knowledge: but he is not bound to give direct and positive evidence; in this, as in

all other cases, he may prove it by circumstances, which make out a case of such high probability as the Court cannot avoid believing and acting upon. Moreover, he needs not prove that the knowledge extended to all particulars; for, if the father is clearly shown to have known that there was such an improvident dealing on foot—a dealing which, from the nature of the thing and the situation of the party, must needs be improvident—and did not inquire, I shall hold that his ignorance of some of the particulars which he might have learnt, had he taken due pains, goes for nothing. At the very least, much slighter evidence will be sufficient in this case to fix him with a knowledge of the whole, than where he was not proved or admitted to have been aware at all of what was going on. It appears, not merely from the answer of the defendant, but from the evidence in the cause, that Mr. Hamlet communicated, through his agent Mr. Newland, to persons whom he believed to be Lord Lorton's agents, the whole particulars of the transaction. This however goes for very little, except as showing that he acted with good faith, and is entitled to credit, when he represents that he refused to engage in the dealing without the father's knowledge and consent. But the evidence goes much farther. Mr. Anthony Lefroy, who is Lord Lorton's son-in-law, and brother-in-law to the plaintiff, swears that he went to Mr. Newland's, at the request and on the behalf of Lord Lorton. Mr. Newland swears to having distinctly told him the nature of the loan, and called his attention to the great loss which would

be sustained by a re-sale of the goods; and he adds, that Mr. Anthony Lefroy said, the sacrifice should not be considered, provided the family estate were saved. Now this is uncontradicted; for Mr. Anthony Lefroy only swears to the best of his now recollection. It would be too much to suppose, that one of these witnesses had perjured himself because the other did not recollect the communication; and because it may appear improbable that he should have forgotten such a disclosure, upon which he had made such a remark. We must therefore, I think, take it to be proved that a near connection of Lord Lorton, sent by him to attend a meeting upon this business on his behalf, was informed by Mr. Hamlet's agent of the particulars of the transaction; and this is now before the Court much more plainly than it was before—both because the observation made by Mr. Anthony Lefroy is now for the first time in evidence, and also because we now first have the important circumstance that he attended at Lord Lorton's desire, and on his part. Now, although I consider this as a fact of considerable weight, yet it might by itself be insufficient to bring the case within the principle, beside being open to the remark that Newland did not tell Serjeant Lefroy, Anthony's father, although he was the person principally sent to confer with him, was the experienced man of business, and was by at the time reading the instrument. But there is another circumstance in the cause of great moment. Lord Lorton is examined, and he does not give an absolute and unqualified denial of all knowledge of the loan being in goods.

He only swears in his deposition, whatever he may have done in his affidavit, to his ignorance before the execution of the mortgage, that goods were in any part the consideration of that mortgage; and also that, to the best of his recollection, he knew nothing respecting the mortgage, or its existence, before its execution; upon which it is most obvious to remark, that if he did not at that time know of the existence of a mortgage, he could not by possibility have known that the goods were part of its consideration; and that therefore this negative testimony amounts to nothing, and is quite consistent with his knowing that there was a negotiation on foot for a loan in goods. Nay, it is consistent with Mr. Anthony Lefroy's having repeated to him the conversation with Mr. Newland, which Mr. A. Lefroy only says he did not repeat, so far as he recollects. It may be further noted, that the interrogatory to Lord L. is framed so as to obtain from him a restricted answer, confining him to a negation of knowledge connected with the mortgage. This remark upon Lord Lorton's evidence lays the foundation for another, upon the omission to call Ferrall, which, but for the defect of that deposition, I should have been less disposed to press. Ferrall, according to Lord Lorton's account, had volunteered his information that Mr. King was in the hands of sharpers. Upon this, his Lordship saw him repeatedly, and learnt from him that a transaction was then going on with Mr. Hamlet to raise money by post obit. Upon this information he acted; sending the Lefroys to see Newland, and seeing Newland himself, in consequence of what Ferrall had told him. Which party ought

to have called Ferrall? Clearly not the defendant; for, although the affidavits on the motion gave no warning of the great hostility of his language towards Mr. Hamlet and his agents, yet they sufficiently showed that he had been acting as an informer against him; and as to his being in league with him, because Newland says he had known him before, I take that to be a refinement; for Newland also swears most positively that he came to him on this occasion from Burt, to ask about a loan for a client of Burt's; that is, for Mr. King, who employed Burt. I do not consider, therefore, that any observation whatever arises upon the defendant not examining Ferrall. So, upon the former occasion, I did not consider that the plaintiff could be made answerable for not producing an affidavit from him, because he had no means of compelling him to make one; but now, when he might have produced him, no explanation is given of his absence. If, indeed, Ferrall was not prepared to deny the account given by Newland, of what he had said, touching Lord Lorton's knowledge of and assent to the whole transaction, his not being produced is very easily understood; and as that was also stated in Newland's affidavit, it seems strange that those concerned for the plaintiff did not inquire whether or not Ferrall would, if examined, contradict it. With this observation, I leave the subject of Ferrall not being examined; by no means intending to treat him as the witness of plaintiff, or as a person whom he was bound to call; still less as the agent of either the plaintiff or Lord Lorton; but as Lord Lorton's informant, on whose suggestions he had

acted, and whose representations to Newland he and his advisers were fully aware of, as well as of the importance of contradicting them. But when the case stands thus, as to Lord Lorton's alleged knowledge of the particular nature and details of the transaction—the loan by way of goods—it becomes most material to recollect that it is clearly proved (indeed it is distinctly admitted by Lord Lorton) that he knew all the while the general nature of the dealing—knew that his son was dealing upon his expectancy. Even had the case stopped here, it might be contended that there is no instance of relief where only that degree of knowledge was brought home to the father. Lord Lorton is aware of what his son is about—knows that he is mortgaging his reversion in the estates of which himself is in possession as tenant for life—acts upon that knowledge—sends his professional adviser and son-in-law to treat for an assignment to himself of that very security which he is apprised is about to be given over that very reversion—and in consequence of the unfortunate estrangement which appears then to have kept them apart, he has no communication with his son on the subject. I will not say that this knowledge of itself, and in these circumstances, is sufficient to preclude the interference of the Court; but there is not a similar case, as far as I know, in which the Court has interposed; and assuredly this knowledge was quite enough to call for further inquiry into all the particulars, which those he was put in communication with could have told him—as they swear they told his

son-in-law ; nay, which his son the plaintiff might have told him through a third person, through the son-in-law, the solicitor, or some other by whose intervention the inquiry could have been conducted. Taking the whole circumstances together, I cannot say that the evidence now before the Court has failed to fix Lord Lorton with the knowledge of the loan, and the manner in which the money, or rather the money's worth, was advanced ; and I therefore think that the case comes within the first of the two propositions which were stated.

2. That the second of these propositions is undeniable in law, and is applicable to the facts of the case, appears equally clear. The whole ground of the doctrine is the pressure upon the heir, or the party in distress dealing with his expectancies. While he continues under that pressure, the law (as Lord Thurlow said in *Gwynne v. Heaton*, 1 Bro. C. C. 1,) treats him as an infant. But the infancy is determined when the pressure is removed. The protection which Sir Wm. Grant well describes (in *Peacock v. Evans*, 16 Ves. 512,) as approaching nearly to incapacity of contracting, must cease when the exigency of the case is at an end. When the expectant heir has himself thrown off the trammels which necessity had imposed on him, or rather had induced him to fetter himself withal, and has placed himself in an adverse attitude towards the other party of whom he has become really independent, he must no longer be treated differently from other persons ; from the rule to which all are subject he cannot be exempt—the

rule which forbids a party to repudiate a dealing of which he voluntarily and freely is availing himself. But least of all shall he be permitted to use for his own benefit, or, which is the same thing, to make away with, or in any manner place out of his reach, for his present benefit, the property of another; and then to repudiate the contract by which that property came into his possession. To hold that he was entitled to do this after the pressure of his circumstances had been removed, and merely because he had been driven to obtain possession by former difficulties, would be an extravagant stretch of the doctrines of this Court.

Let us then look to the facts of the case, and see whether the plaintiff was under the influence of continuing pressure at the time when he placed the defendant's goods beyond his reach. It must plainly be a very strong case to justify us in holding, that, after he gave the defendant notice to take back the goods, he had a right to sell them, and now has a right to pay for them, not at the price which he took them for, but that which they fetched at his own sale of them. Still less can this be allowed if the father shall appear to have before that time become a party to the proceeding. Upon this part of the case we now have important evidence not in the case before. It appears that Mr. Bridges was Lord Lorton's solicitor at least as early as the years 1829 and 1830; that in January 1829, he was employed by both Lord Lorton and the plaintiff; but it plainly appears that he was principally employed by the father, to make an application to Mr. Hamlet to take back his goods and

deliver up the securities; and Mr. Bridges distinctly swears that if Mr. Hamlet would have done so, he believes that Lord Lorton would have enabled his son to make good the offer, that is, return the goods, which of course could only have been effected by satisfying Mr. Robins's lien for 2500*l.* advanced upon them. Can it then be said that the pressure was continued upon Mr. King? Is it not clear that his father had come to his rescue, and that he was in a condition with such assistance to have returned Mr. Hamlet's property? But upon the latter refusing, a bill is filed, proceeding upon the footing of the offer; that is, to have the securities given up on re-delivery of the goods. Then the goods should have been kept forthcoming with a view to this suit, and the course for Mr. King now to have taken—now that he had his father's assistance—was to repay Mr. Robins's advances, which his Lordship was ready to do, had Mr. Hamlet been willing to receive the goods, and to keep possession of those goods till the suit he had commenced, or at least his son in concert with him had commenced, should be determined. But instead of this they suffer Mr. Robins to sell them; in other words, they take the benefit of the loan of goods obtained from Mr. Hamlet, and which had enabled Mr. King to effect a loan of money with Mr. Robins; and they prefer the accommodation of continuing that loan from Mr. Robins, to paying it off, and thereby keeping Mr. Hamlet's goods ready to deliver as soon as they should prove their title to be relieved against that transaction with Mr.

Hamlet, by means of which the goods had been obtained. It is true Mr. Bridges applied to Mr. Robins, by Lord Lorton's desire, after the first bill was filed, to postpone the sale for a short time, in the hope that Mr. Hamlet might be induced to make an arrangement for taking the goods back. But he applied in vain; and why? The reason is not given; but it is as plain as if it were stated in so many words; the application was not accompanied with a tender of the money which Mr. Robins had advanced; and why was it not? That reason is equally plain, though it too is withheld; it was because the parties preferred letting the sale take place to repaying the money, unless by means of such a repayment they could make sure of getting Mr. Hamlet to give up the securities, and receive his plate and trinkets. In other words, they deemed it more convenient to continue the accommodation of the loan from Mr. Robins, which the goods had enabled them to negotiate, than to repay that loan and have Mr. Hamlet's goods to re-deliver, when this Court should decide that he must take them. They had a right to do so; but having elected to use that right, it followed that their first bill was dismissed; and it equally followed that they never can reconstruct their whole case to make it suit the extraordinary position in which they have voluntarily placed it. It is by their voluntarily departing with those goods—that is, under no pressure whatever, using them to continue a loan which the possession of them had at first enabled them to contract, instead of paying it off—that they

are not now in a situation to require that the transaction may be rescinded, and each party placed in his former predicament ;—that they are not now in a situation to ask of the Court a restoration of what they gave Mr. Hamlet in return for giving up to him—not what they got from him—but what his goods fetched at their own sale ; retaining all the accommodation they had by the use of them with Mr. Robins. To countenance this demand, would be neither law nor any thing like law ; neither equity, nor any thing like equity. The circumstance of the balance which remained after the sale (528*l.* odd) being paid over to Mr. Bridges, and carried to Lord Lorton's account, is of no great consequence. It only mixes Lord L. somewhat more with the proceedings in 1829. Mr. Bridges states that his Lordship in reality received none of it, as it went to pay debts of his son for which his Lordship was not answerable. Doubtless, however, it was so applied with his permission, after having been carried to his credit ; and therefore he received and used the balance, however kind and praiseworthy may have been the purpose to which he devoted it.

I have said nothing as to the evidence of value, which is in some respects stronger now than upon the motion, because little appears to turn upon that. There never has been any reasonable doubt that the valuation put upon the goods was that which all persons were charged indifferently who purchased at the defendant's shop ; that he was lending what to him would have been worth 8000*l.* to sell, and that the benefit he gained by the trans-

action was the certain market for all this amount of wares, and avoiding the risk of some at least standing over till their price fell. But certainly if it was material, the proof of the prices being fairly charged in the valuation at which the advance was made is strengthened since the motion, by the plaintiff producing no evidence against that of the defendant's shopmen and other valuers, and by the circumstance of Mr. King himself having bought some of them at the sale (30*l.* or 40*l.* worth), which consequently he could have had examined by his own valuers, and shown to be worth less than they were charged to him by Mr. Hamlet's tickets, if such had been the case.

I shall say a word upon *Barker v. Vansommer*, 1 Bro.C.C. 149,—a strong case, one should perhaps say, if it were merely upon the subject of expectant heir. If it had turned upon that, it would have been clearly distinguished from this, by having neither of the two peculiarities which we have been considering. But the decision in that case plainly did not at all depend upon Mr. Barker being an expectant heir ; and he could not be said to be dealing with his expectancy. His being a young man in want of money, is only adverted to as one circumstance going to make out the case of loan, and negative the contention that it was a sale of goods. But all turned upon the transaction being a loan at usurious interest, the transfer of goods being a shift or cloak for usury. Arguments are used and cases cited ; but not a word is said of dealing with reversions, nor is one case cited of the many belonging to that head of

relief. Upon the whole of the circumstances, the Court thought it was a loan at usurious interest, and treated it as such, ordering the securities to be delivered up on payment of what they fetched, after directing an inquiry as to the circumstances of the sale. The present case has not been put upon this ground, but the other; and it is plain it cannot stand upon the mere ground of usury. For though there may be loan, there is not sufficient proof of the high rate of interest. A person not in the situation of expectant heir, may with his eyes open, as here, obtain a quantity of goods from another, provided he takes them at the shop price, as every other person,—as all ordinary customers would do. His object in obtaining them being to sell again, and the tradesman knowing that to be his object, cannot of itself make the transaction usury. These are questions of fact, and any circumstance altered or added, may change the whole complexion of the transaction. The party taking the goods in a shop, by choice from the stock exposed to all customers, and at the shop prices, is a very material fact, and greatly differs this from a private bargain on the foot of a value imposed on the goods by the seller or lender. It tends to show that whatever use the borrower or buyer is to make of the goods, and whatever loss he may sustain by the resale which such use requires him to make, the lender or seller gains only the benefit of a market for part of his merchandise, which he might not be otherwise able, so easily and in so large a lot, to dispose of. It is not necessary

to decide that those particulars in every case, and in all other circumstances, will prevent the transaction being held a cover for usury, as the sale to Mr. Barker was deemed to be. It is enough to say that they differ this case from his. Each case of this sort turns on its own circumstances. As a rule we can only say all such dealings are in themselves suspicious, and whoever engages in them runs risks not incident to ordinary transactions in trade, and must lay his account with the whole circumstances being sifted, in a way, or by a process of scrutiny, from which other transactions are exempt. Mr. Hamlet's transaction has been so sifted, and I think it has stood the test.

For the reasons which I have given at length in consideration of the importance of the question, and the apparent but not real discrepancy between the present and former decisions in the case, I am of opinion that the bill must be dismissed.

From this decision there was an appeal to the House of Lords; and the editor has been favoured with the following note of the judgment there.

Lord Lyndhurst.—My Lords, I attended this case when it was argued, and have examined the papers carefully, as also the elaborate judgment below of my noble and learned friend, from which I see no reason at all to differ in any respect. I should therefore move your Lordships to affirm.

Lord Brougham.—There were two points touching the case on the injunction, one by the Vice-Chancellor, and another by me on appeal; and as both of these were against the present respondent on the state of the facts at that time before the Court, possibly your Lordships will not give costs of the appeal, if, as I rather think, these were not given below.

Lord Lyndhurst agreeing, no costs were given. — Sept. 5, 1835."

KEPPELL *v.* BAILEY.

THE ensuing are the sections in the act 32 Geo. 3, c. cii., upon which this case turns. The act is entitled, "An Act for making and maintaining a Navigable Cut or Canal from, or from some Place near Pontnewynydd, into the River Usk, at or near the Town of Newport, and a Collateral Cut or Canal from the same, at or near a place called Cryndau Farm, to or near to Crumlin Bridge, all in the County of Monmouth; and for making and maintaining Railways, or Stone Roads, from such Cuts or Canals, to several Iron Works and Mines, in the Counties of Monmouth and Brecknock":—

Sect. 91.—And be it further enacted, that, in consideration of the great costs, charges, and expenses which the said company of proprietors will be at in making and maintaining the said canals, railways, or stoneways, and other works hereby authorized to be made and erected, it shall and may be lawful to and for the said company of proprietors, from time to time and at all times for ever, to ask, demand, take, and receive, to and for their own use and benefit, for the tonnage and wharfage of all iron, iron stone, iron ore, lead ore, lime-stone, timber, coals, and other goods, wares, merchandizes, and commodities whatsoever, which shall be navigated, carried on, or conveyed upon, through, or over the said canals and railways, or stone roads, or any part thereof respectively, such rates, tolls, and duties as shall be fixed by the said company of proprietors at any general assembly to be held as aforesaid, not exceeding the respective rates, tolls, and duties hereinafter mentioned; (that is to say,) For all iron stone, iron ore, lead ore, coals, culm, stone coal, coaks, cinders, and charcoal, and for all lime, (except what shall be intended to be used for manure,) and for all tiles, lime-stone, flag stones, and other stone which shall be navigated, carried, or conveyed upon the said canals or railways, or any part thereof, any sum not exceeding twopence-halfpenny per ton per

mile, and so in proportion for any greater or less quantity than a ton, or greater or less distance than a mile: For all hay, straw, and corn in the straw, all materials for the repair of roads, all lime intended to be used for manure, and for all other kinds of manure which shall be navigated, carried, or conveyed upon the same canals or railways, or any part thereof, any sum not exceeding three halfpence per ton per mile, and so in proportion for any greater or less quantity than a ton, or greater or less distance than a mile: And, for all iron, lead, timber, and all other goods, wares, merchandizes, and commodities whatsoever, not before specified, which shall be navigated, carried, or conveyed upon the same canals or railways, or any part thereof, any sum not exceeding fivepence per ton per mile, and so in proportion for any greater or less quantity than a ton, or greater or less distance than a mile: Which said respective rates, tolls, and duties, so to be fixed as aforesaid, shall be equal throughout the whole length of the said canals and railways, except as hereinafter mentioned.

Sect. 128.—And be it further enacted, that if the owner or owners of any manor, estate or lands, containing any mines, seams, or veins of iron, iron stone, lead, coals, or other minerals, or any quarries of lime-stone, or other stone, slates, or tiles, or the proprietor or proprietors of any iron furnaces, forges, or other works, or the renters, lessees, or occupiers of the same, or of any or either of them, situate and lying within the distance of eight miles from any part of the said canals or railways, hereinbefore particularly described and authorized to be made as aforesaid, shall deem it expedient or necessary that any railways or waggon roads should be made over, through, to, along, in, upon, or under the lands or grounds of any other person or persons, or across any highway or highways, or private road or roads, or that any bridges should be erected over and across any rivers, brooks, or watercourses, for the purpose of conveying his, her, or their iron, lead, coals, culm, lime-stone or other stone, slate, tiles, or minerals, or any goods, wares, or merchandizes, to or from the said canals or railways hereinbefore particularly described, and if the said company of proprietors shall refuse to make any such railway or waggon road, or to erect any such bridge, in virtue of the powers hereinbefore given them in that behalf, for the space of three calendar months after an applica-

tion and request in writing shall have been made to them for that purpose, at a general meeting or assembly to be held as hereinbefore is mentioned, by the person or persons so deeming it expedient such railway or waggon road should be made, or such bridge erected as aforesaid, then and in such case, and from time to time as often as the same shall happen, it shall and may be lawful to and for the person or persons making such application and request, at his or their own proper costs and charges, at any time after the expiration of such three calendar months, without the consent of the owner or owners of such lands or grounds, rivers, brooks, or watercourses, to make any such railways or waggon ways, or to erect any such bridge or bridges as shall be deemed expedient to be made or erected as aforesaid, he or they first paying or tendering satisfaction for the damages to be thereby occasioned to any such lands or grounds, rivers, brooks, or watercourses, in the manner hereinbefore directed with respect to any lands or grounds to be taken by the said company of proprietors, for the purposes hereinbefore mentioned; and it shall also be lawful for the owner or owners of, and person or persons interested in such lands or grounds respectively, to treat and agree with the person or persons desiring to make any such railway or waggon road, or to erect any such bridge as aforesaid, touching the damages which such owner or owners of, and person or persons interested in such lands or grounds, shall or may sustain thereby; and in case they cannot agree concerning the amount or value of such damages, or in case the owner or owners of, or person or persons interested in such lands or grounds, shall refuse or neglect to treat, or by reason of absence, or otherwise, shall be prevented from treating concerning the same, then the same shall be settled and ascertained by the said commissioners, or assessed by a jury if required, in such and the like manner as any other damages to be occasioned by the exercise of any powers granted by this act are hereinbefore directed to be settled and ascertained or assessed: Provided always, that the person or persons desirous of having any such railway or waggon road, or bridge made or erected as aforesaid, shall, in the application and request to be made by him or them to the said company of proprietors for that purpose as aforesaid, specify the name or names of the person or persons making such application, and describe the line along which any such railway or waggon way is

intended to pass, with the distance from point to point, where any such railway or waggon way shall begin and end, or the precise spot where any such bridge is intended to be erected; and all and every such railways or waggon roads, and bridges so to be made and erected as last hereinbefore is mentioned, shall, after the same shall be completed, be public and open to all persons for the conveyance of any minerals, goods, wares, merchandizes, or commodities whatsoever, in waggons or other carriages properly constructed, and for the passage of horses, cows, and other beasts or cattle, on payment to the person or persons at whose charge and expense such railways or waggon roads, or bridges, shall have been made or erected, and his, her, and their heirs or assigns, such and the like tolls, rates, or duties as shall for the time being be payable to the said company of proprietors, for the conveyance of such minerals, goods, wares, merchandizes, and commodities, and the passage of such horses, cows, or other beasts or cattle upon the railways first hereinbefore particularly described and intended to be made by them.

Sect. 129.—And whereas it may possibly be for the interest and advantage of some person or persons who may hereafter be desirous of having any such railway or waggon road as aforesaid made by the said company of proprietors, or their successors, to pay a higher rate, toll, or duty for the conveyance of his or their goods, wares, merchandizes, or commodities thereon, than shall for the time being be payable for the conveyance of the like articles upon the railways or waggon roads, first hereinbefore particularly described, rather than not have such railways or waggon road made by the said company of proprietors, or their successors; be it therefore further enacted, that in order to induce the said company of proprietors, or their successors, to make such railway or waggon road, railways or waggon roads, agreeably to the request of such person or persons as aforesaid, it shall and may be lawful for them the said company of proprietors, and their successors, in case they shall agree to make any such railway or waggon road, from time to time and at all times from and after the same shall be made, to demand and take, not only of and from the person or persons requesting such railway or waggon road to be made, but also of and from all and every other person and persons whomsoever, for the conveyance of any iron, iron stone, iron ore, lead ore, coals, culm, lime, lime-

stone, and all other goods, wares, merchandizes, and commodities whatsoever, upon any such railway or waggon road, such rates, tolls, or duties as shall be mutually fixed and agreed upon for that purpose between the said company of proprietors, or their successors, and the person or persons so applying and requesting to have any such railway or waggon road made by them as aforesaid, so as the same do not exceed the sum of fivepence per ton per mile; any thing hereinbefore contained to the contrary thereof notwithstanding: Provided always, that such last-mentioned rates, tolls, or duties shall and may be altered and varied from time to time, by the said company of proprietors and their successors, in such and the like manner as they are hereinbefore empowered to alter and vary the tolls, rates, and duties first hereinbefore mentioned and authorized to be taken.

The following is the copy of part of an abstract of the indenture of August, 1795, which it was contended was an evasion of the foregoing provisions. It was executed by the Messrs. Kendalls, the lessees of the Beaufort furnaces and iron works, and the proprietors or lessees of two other considerable furnaces and iron works, who, in combination with a number of persons, had, under the authority of the said act, formed themselves into a joint-stock company, for the construction of the Trevil rail-road:—

“And thereby, after witnessing that each of the parties thereto, for himself, his heirs, executors, administrators, and assigns, covenanted with the others of them and their and his executors, administrators, and assigns, mutually and reciprocally that they, or their respective executors, administrators, or assigns, would remain copartners and proprietors of the Trevil rail-road, and the profits to be divided therefrom during the continuance of the demise which they had obtained, subject to the conditions and regulations therein specified; and after declaring that the rail-road and the profits thereof should be divided into fifty-five shares, which should be vested in the parties thereto, and their respective executors, administrators, and assigns, for their respective use and benefit, in proportion to the sums of money subscribed by them respectively, and after specifying the number and particulars of the shares allotted to the several subscribers, of which shares the five respectively numbered from seven to eleven inclusive were stated to belong to Edward Kendall and

Jonathan Kendall, their executors, administrators, and assigns, as joint tenants, and after reciting that the proprietors of the iron furnaces, parties thereto, necessarily made use of great quantities of lime-stone in their furnaces, which for a long time past they had procured from a quarry called the Trevil Quarry, and carried to their furnaces at a great expense, for the more convenient carriage of which the Trevil rail-road was chiefly intended, and that it was in consideration of the quantity of lime-stone which would be carried upon the said rail-road for the use of the furnaces, and of the quantity of iron stone which would also be carried upon the rail-road, that the other parties became subscribers to the undertaking; and that at the time of the subscription it was understood that the said proprietors of the furnaces would respectively enter into an engagement to procure all the lime-stone which they might want from the said Trevil Quarry, and convey it along the said Trevil rail-road, and also pay to the proprietors of the rail-road a toll of fivepence per ton per mile for all such lime-stone, as well as for all iron stone, and for all other goods, except stone for building, which was to pay a toll of three halfpence per ton per mile; and that it was also understood that the said proprietors of the furnaces should respectively engage to carry upon such part of the rail-road as should lie between their mines and their furnaces, all such iron stone as they should have occasion to convey to their respective furnaces; and thereupon, as regarded Edward Kendall and Jonathan Kendall, who were the proprietors of the furnace called the Beaufort Iron Works, it was witnessed, that they the said Edward Kendall and Jonathan Kendall, in consideration of all and singular the premises, did thereby for themselves, their heirs, executors, administrators, and assigns, jointly and severally covenant and agree with all the other parties thereto, and their executors, administrators, and assigns, that they the said Jonathan Kendall and Edward Kendall, their executors, administrators, or assigns, should from time to time and at all times thereafter, whilst they or any of them should be proprietors or lessees or occupiers of the said furnace and works called the Beaufort Iron Works, procure all the lime-stone which should be wanted for the use of the said iron works, or for any new furnace and works thereafter to be erected by them near the same, from the quarry called Trevil Quarry, and should cause all such lime-stone to be carried from

the said quarry to the said iron works along or upon the Trevil rail-road, and should also cause all the iron stone or iron ore which they should have occasion to convey from their mine works to their furnace called the Beaufort Iron Works, or to such new furnace, to be carried along such part of the rail-road as should lie between such mine works and the furnaces, and also should pay or cause to be paid to the collectors to be appointed by the proprietors of the rail-road for the time being to receive the tolls for the conveyance of goods thereon, a toll of fivepence per ton per mile for all lime-stone, iron stone, or mine, goods, wares, merchandizes, and commodities whatever, except stone for building, and a toll of three halfpence per ton per mile for all stone for building belonging to them the said Edward Kendall and Jonathan Kendall, their executors, administrators, or assigns, or any of them, which should be carried or conveyed upon the rail-road or any part thereof, and so in proportion for any greater or less quantity than a ton."

The proprietors or lessees of the two other great iron works, by the same indenture, entered into similar covenants.

The defendants purchased the Beaufort Iron Works in 1833, and soon afterwards began to form a new rail-road with the intention of procuring lime from other quarries; whereupon the present suit was instituted, the plaintiffs being the shareholders of the Trevil rail-road, and an injunction was obtained *ex parte* to restrain the defendants from using the new rail-road. A motion was now made to dissolve this injunction.

For the defendants, Mr. Pepys, Mr. Jacob, and Mr. Humphry. For the plaintiffs, Sir E. Sugden, Mr. Knight, and Mr. Lynch.

Jan. 29, 1834.

A covenant by the lessees of certain iron works that they, their executors or assigns, should convey lime-stone and iron stone by a particular rail-road, is not repugnant to the law concerning perpetuities, nor to that avoiding stipulations in restraint of trade, although the leaning of the law is against such a covenant.

LORD CHANCELLOR.—This case was argued with much learning on both sides, and presented to the

An undertaking to keep the railway in repair may perhaps be implied, and the covenant cannot therefore be deemed defective for want of mutuality. The covenant, however, not to be supported in this case, for two reasons: first, that it violates in its particular terms the provisions of a local act; secondly, that, not running with the land, it cannot bind the assignees of the covenantor.

The notice which the assignees have of such a covenant affords no ground for the interference of a Court of Equity.

General remarks upon cases of perpetuities and of real covenants.

Court in every view that could be taken of the various points raised. Into the whole of the matters discussed at the bar it will not be necessary to enter ; but I shall advert to some of them beyond those upon which the decision turns, on account of their intrinsic importance.

There is one view of the subject with which I am not greatly struck, notwithstanding the ability displayed in pressing it. I mean the argument against the covenant in question, derived from its supposed repugnance to the rules respecting perpetuity. Those rules, generally speaking, bear reference to but one thing, and that wholly wide of the present subject—the tying up of property so as to restrain its alienation. But, taking the doctrine in the largest sense, it can only include and bring within the scope of its denunciation, whatever deprives, or tends to deprive, all who are interested in any rights, of the power freely to use those rights in any way they may think fit. Thus I will admit that the mere restraint upon alienation, properly so called, is not the only thing prohibited by the doctrine ; and that the doctrine strikes at other devises and other limitations, and so, too, at other contracts than those, which simply confine the holding and the passing of property to certain persons, or to a given succession of heirs. If the enjoyment of the property is fettered by any contrivances ; if its rents and profits are appropriated ; if the use of it is cramped by regulations prescribing certain things to be done with it, or suffered upon it ; the rule against perpetuities may be as effectually violated

as by openly and directly and entirely restraining its alienation. It may be taken out of all control—placed beyond all commerce—exempt from all free management and disposal—indirectly as well as directly—by piecemeal as well as by wholesale. But then the fetter must be complete as far as it goes ; there must be a perfect restraint ; all hands must be tied ; every one concerned must be made powerless ; there must be no person who by himself, or by agreement with others interested, can freely enjoy the property to which he or they are entitled ; otherwise we are abusing the term when we speak of fetters or perpetuities. Thus, if an estate is given to any person or succession of persons for a term, or for lives, not to be alienated, this is an effectual restraint ; and the law will not permit it to continue beyond a certain period well known, and now, by the late important decision upon executory devises (*a*), accurately defined. During that allowed period all who have any interest in it, nay, all mankind agreeing, cannot unfetter the estate. It remains to be possessed in a certain way, enjoyed by certain persons, transmitted by a certain rule, in a prescribed course of descent. But there would be nothing like a fetter if all the while some person were in existence by whose consent the course of succession could be altered, or the enjoyment varied

(*a*) *Cadell v. Palmer*, in the House of Lords, argued before the Judges and decided. The rule laid down was, that the twenty-one years which may be added to the life or lives in being, is a period in gross and independent of any reference to issue in ventre sa mere. (The case is now reported, 10 Bing. 140.)

without stint, or the alienation effected uncontrolled ; and there would be nothing like a perpetuity if the same order of things, the same arrangement, were to endure indefinitely. To apply this plain distinction to the present case—I do not at all doubt that the enjoyment of property may be tied up, and an illegal perpetuity created, by annexing conditions to grants, or by executing covenants whereby, whoever happens to be in possession shall be restrained from using that which is the subject of the grant or the covenant, in all but a certain prescribed way ; provided always, that the restraint so constituted is not reserved in favour of some other party, who may release it at his pleasure ; and therefore all such conditions and covenants are void if they go beyond the period allowed by law. But if the party for whom the condition is made, or the party covenantee, has the entire power of dealing with his interest in the subject-matter, it is an obvious mistake to treat this as an instance of perpetuity, or of any tendency towards perpetuity. Indeed the property, the subject-matter of consideration here, is, not the estate fettered by the condition or covenant, but the benefit reserved by the condition or secured by the covenant ; and upon that there is by the hypothesis no restraint at all. And certainly, to take another view, though one of the parties interested, the owner of the property subject to the covenant or condition, may be fast, the other is loose ; and so, quoad both taken together, that is, quoad all interested, the property is free. Thus, admitting

that the owners of an estate could no more be restrained perpetually from cultivating it by supplies derived from any market but one, or from selling its produce at any but that market, than they could be restrained from selling the estate, and admitting that the one would be as much a breach of the rule against perpetuity as the other, it would be no such violation, nor in any way defraud that rule, if the owner of the estate were restrained from buying and selling at any market save that belonging to a certain party, entitled by grant or by covenant to this privilege, and which he might at his pleasure vary or extinguish. Upon other grounds such a restraint may be objectionable and void in law, as well as bad in policy; but certainly not upon the doctrine of perpetuity, by which it is no more struck at than a right of way or other easement which the owners of one estate may enjoy over the close of another. Such easement continues to be enjoyed by the owner of the one estate, whoever he may be, over the other estate, into whose hands soever it may come. So of a rent issuing out of an estate, and which may nearly absorb its profits—no one ever deemed this objectionable on the ground of perpetuity. The easement and the rent are the property in question, and they are free; the party entitled to them is *pro tanto* interested in the tenements subject to the easement or yielding the rent; he has the incorporeal hereditaments connected with the corporeal hereditament of the land; and the circumstance of the land being subject

to his rights, while he is unfettered in the enjoyment and the disposal of them, does not either constitute a perpetuity, or tend to one. I am therefore clearly of opinion that the covenant to take the lime at the Trevil works, and carry the iron by the Trevil railway, is not bad on the ground of its tending to a perpetuity, or constituting a shift whereby the rules of law on that head may be evaded. It may be, and undoubtedly is, liable to other grave objections, but it is not exposed to the hatred which the law bears towards perpetuities, and does not fall under the prohibitions which have resulted from thence.

That it is alleged to be in restraint of trade may next be considered, and in this objection there appears at first to be more weight. The covenant, here, is not contended to be in general restraint of trade, which would beyond all doubt make it void in whatever way it was effected, whether by promise or bond, with or without consideration. But the restraint is partial; and then the law will support it if,—to use the language of Lord Chief Justice Parker, in *Mitchel v. Reynolds*, 1 P. Will. 181, in that elaborate judgment which he delivered after the manner of the ancient authorities,—in the opinion of the Court, whose office it is to determine upon the circumstances, it appears to be a just and honest contract made for a reasonable consideration. In that case the covenantor restrained himself from exercising his trade of a baker for five years in the premises demised to him for that term by the same instrument; and the Court

dwelt on the period of the restriction being co-extensive with the term as a proof of adequate consideration. But though the Court is to judge, generally speaking, whether or not the consideration be adequate, it plainly has no very delicate scales for weighing the adequacy and comparing it with the restraint. That the covenantors in the present case derived considerable benefit from their bargain cannot be doubted. The contract enabled them, as well as the other parties, to obtain the advantage of the railway, which, but for this arrangement, would probably never have been constructed. The public, moreover, obtained the like benefit; and although in the course of time and in the progress of improvement that advantage has ceased, and it is said that great detriment arises both to the three iron-works and to the community from the continuance of the restriction, it is plainly as incorrect as it is unjust in such a case to judge by the event, and to measure now the consideration for originally submitting to the restraint, by the benefit derived now from the works then erected, making the adequacy of that consideration then to depend upon all that has happened in altered circumstances; or, in other words, allowing a party, who with his eyes open made a bargain for his own benefit, and which was really beneficial at the time, to escape by showing that it has eventually become less advantageous than he expected, or even wholly detrimental. No case can be found where such a rule has been applied, or where any standard has been resorted to for trying the consideration, ex-

cept the circumstances inherent in the contract itself, independent of accident and of subsequent events.

The want of mutuality is indeed urged against this covenant. It is said that though one party is bound to use the railway, the other is not bound to maintain it. And this is likened to the case of *Young v. Timmins*, 1 Cromp. & Jer. 331, in the Exchequer, and one in this Court, *Smith v. Fromont*, 2 Swanst. 330. I think there is some ground for this argument, though upon the whole it would not be decisive against the covenant if it could stand in other respects; for besides that you may imply an undertaking to keep the railway in repair, upon the construction of the whole, it seems sufficient to say, that were the covenant binding in other respects, the covenantors or their assignees might have their remedy, if not upon such implied covenant, certainly by being released from their own obligation as soon as the railway failed them.

The utmost, therefore, that can be said upon this branch of the case is, that such contracts deserve no particular favour. They are at all times somewhat improvident with respect to the individuals; and the public interest is, upon the whole, more likely to lose than to gain by them. The leaning of the law is against them; the proof is thrown upon those who support them and claim under them; and that proof should, with every thing belonging to the case that rests on them, be narrowly watched.

Bearing this in mind, we now come to an

objection of a very serious nature, and which appears to me of itself sufficient to dispose of the present application for the interposition of the Court by way of Injunction; for the case may be regarded as now first before us, though, strictly speaking, the motion is for dissolving an Injunction already granted.

The Trevil railway was made under the powers given by the Monmouthshire and Brecknockshire Canal Act, passed 32 Geo. 3, c. 102, for the formation of that canal and the cuts belonging to it, and of railways or stone roads from the canal and cuts to the several adjacent iron-works in the above-mentioned counties. The company are, by the 91st section of that act, confined to certain rates of toll, on the railways as well as on the cuts. The rate charged on lime-stone, iron, &c. is not to exceed $2\frac{1}{2}d.$ per ton per mile; and by the 128th section, if any persons are minded to make a railway within eight miles, they are to give the company notice, and if the latter refuse or neglect for a given time, they may themselves undertake it; but no greater rate is to be paid on that railway than the $2\frac{1}{2}d.$ which the company are authorized to charge. By the 129th section, however, persons may agree with the company and induce them to undertake such railways on payment of tolls, not exceeding $5d.$ per ton per mile. Now it is impossible attentively to read these sections without perceiving that two objects are here manifestly in contemplation of the legislature, and form the governing policy of this important part of the act: 1. The preference is given

to the company, who are, rather than any individuals, to make the railway; and it is only on their refusal or neglect that any others are to undertake it; and, 2. The public—that is, the proprietors of adjoining closes—are not to be subject to the strong powers of the act—powers which it has in common with all such acts, but which are always to be most strictly pursued,—unless there is the reasonable certainty that there will be a considerable traffic upon the road, a traffic, to wit, sufficient to maintain it at the limited rate of charge. Now the indenture or agreement of August, 1795, violates both those provisions by the covenant among the parties to pay *5d.* a ton. It deprives the company of its prior right to make the road at the higher rate of charge; and it deprives the neighbouring owners of the security intended to be given them, that their property should not be invaded unless a traffic of a given amount were to be expected. All Courts have, for obvious reasons, at all times construed such provisions most strictly. Whatever is required to be done as a condition precedent to exercising the extraordinary right of making roads over private property has always been exacted to the letter, and the party omitting been held a trespasser if he invaded the property of his neighbour under the act. Here the ground cannot perhaps be said to have been taken by the Railroad Company until they had performed the things previously ordered to be done; but the act of parliament having given a general security against the encroachment, unless a certain state of things

existed, that provision has been evaded by an arrangement of the parties, wholly contrary to the plain intention of the legislature, and in fraud if not in defiance of it.

Although I consider this as being a sufficient ground for dissolving the injunction, yet it is far from being the only one; and I shall now add, that upon the best consideration which I can give to the nature of the covenant, it appears to me very clearly that it does not run with the land, and is therefore not binding upon the assignees of the Kendalls. This is the opinion which I have had from the moment I saw it, and further reflection has only served to confirm it. Between the estates of the occupiers of the three iron-works and the estates or the persons of their associates in the railway speculation, with whom they covenant, there is no privity—no connection whatever of which the law can take notice. There is no relation at all, in point of fact, any more than in point of law. The Kendalls, for instance, upon whose covenant the plaintiff here relies, contending that it binds the defendants as purchasers of their iron-works, did not stand in any relation to the other share-holders, which, from its nature, could enure to affect the property sold by them. There was no unity of title in the estates of the contracting parties; the iron-works, and the lime-pits, or railway, did not come to them severally from the same owner; they were not held by them severally under the same landlord; but, what is of more importance—inasmuch as it is by no means clear that even the kinds of privity

I have mentioned would suffice—they did not stand in the relation of lessor and lessee towards each other; and therefore there is no reversionary interest now in the covenantees to which they may annex the right claimed against the assignees of the covenantor; and those assignees are called upon to perform the covenant solely in respect of the estate which they have purchased, and to keep it with parties who, except under that covenant, have no connection whatever with the estate. It is the case of mere strangers; it is a covenant by which the owner of a messuage agrees with the owner of a neighbouring lime-work and rail-road, that he and his executors and assigns will always use that lime-work and railway for making iron at, and carrying it from, such messuage. Whether the word “assigns” in this covenant, used as it is in a very peculiar manner several times in the deed, means assigns of the work, or only of the railway shares, has been made a question; and if it were necessary to decide it, I incline much to the latter construction, which, if adopted, would make it unnecessary to pursue the argument further. But I think this admits of sufficient doubt to make it more advisable that the decision should not turn upon it. Assuming, then, for the present, that the Kendalls covenanted for their assigns of the Beaufort works, could they, by such a covenant with parties who had no relation whatever to those works, except that of having a lime-quarry and a railway in the neighbourhood, bind all persons who should become owners of those works,

by purchase as well as by descent, at all times to buy their lime at the quarry, and carry their iron on the railway?—Or could they do more, if the covenant should not be kept, than give the covenantees a right of action against themselves, and recourse against their heirs and executors, as far as these received assets?

Let us regard the question, first, upon principle. There are certain known incidents to property and its enjoyment; among others, certain burthens wherewith it may be affected, or rights which may be created, and may be enjoyed over it by parties other than the owner; all which incidents are recognized by the law. In respect of possession, the property may be in one while the reversion is in another: in respect of interest, the life estate in one, the remainder in tail in a second, and the fee in reversion in a third. So, in respect of enjoyment, one may have the possession and the fee-simple, and another may have a rent issuing out of it, or the tithes of its produce, or an easement, as a right of way, upon it, or of common over it. And such last incorporeal hereditament may be annexed to an estate, which is now wholly unconnected with the one affected by the easement, although, it is material to observe, both estates were originally united in the same owner, and one of them was granted out by him with the benefit, while he granted out the other subject to the burthen. All these kinds of property, however, all these holdings, are well known in the law, and familiarly dealt with by its principles. But it must not there-

fore be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal that such latitude of invention should be given. There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives—that is, their assets real and personal—to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow. But great detriment would arise, and much confusion of right, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every messuage, might thus be held in a several fashion; and it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed. The right of way or of common are of a public as well as of a simple nature; and no one who sees the premises can be ignorant of what all the vicinage knows. But if one man may bind his messuage and land to take lime from a particular kiln, another may bind his to take coals from a certain pit; while a third may load his property with further obligations to employ one blacksmith's forge, or the members of one corporate body in various operations upon the premises, besides many other restraints, as infinite in variety as the imagination can make them; for there can

be no reason whatever to support the covenant in question, which would not extend to all such burthens as can be fancied. It is obvious that the difference is very great between such a case as this and that of covenants in a lease, whereby the demised premises are affected with certain rights in favour of the lessor. The lessor, or his assignees, continue in the reversion while the term lasts. The estate is not out of them, although the possession is in the lessee or his assigns. There is nothing at all inconsistent with the nature of property, that certain things should be reserved to those reversioners all the while the term continues; it is only somewhat taken out of the demise—some exception to the temporary surrender of the enjoyment; it is only that they retain more or less partially the use of what was wholly used by them before the demise, and what will again be wholly used by them when that demise is at an end. Yet even in this case the law does not leave the reversioner the entire licence to invent covenants which shall affect the land in the hands of those who take by assignment of the term. The covenant must be of such a nature “as to inhere in the land,” to use the language of some of the cases; or “it must concern the demised premises and the mode of occupying them,” as others lay it down—“it must be quodammodo annexed and appurtenant to them,” as one authority has it; or, as another says, “it must both concern the thing demised and tend to support it and support the reversioner’s estate.” Within such limits there may be imposed re-

straints upon the lands demised, which shall follow it into the hands of strangers to the contract of lease, and who only become privy to the lessor through the estate in the demised premises which they take by assignment. But this is saying no more than that within such limits the owner of the land may retain to himself and his assignees of the reversion a certain control over, or use of, the property which remains in himself, or which he has conveyed to those assignees; and that he may so retain it into whose hands soever, as a lessee, the temporary possession may have come. Even he, the continuing owner, is confined within certain limits by the view which the law takes of the nature of property; and if beyond those bounds he were to imagine a stipulation, the lessee's covenant in which he should embody it would not run with the land, but only bind the lessee personally and his representatives.

It only requires a little attention to the cases to satisfy us, first, that even where the privity of lessor and lessee exists, there are bounds so narrow to the province of real covenants, as would make the one in question lie on the extreme verge of it, if it did not fall without it;—secondly, that there can be no doubt of such a covenant being one personal, collateral, or in gross, where that privity does not exist, or some other privity of estate, which, according to one or two of the authorities only, and these I venture to doubt, has been held to render covenants real, that would otherwise have been personal;—and, thirdly, that those covenants which have been held real, ex-

cepting indeed such as relate to title, would have been deemed collateral, where there was no privity in respect of reversion or other unity of title. As all these propositions are proved or illustrated by most of the cases, there would be no convenience in arranging those cases under these three heads; it would only lead to repetition; and therefore, having stated the propositions as the doctrine which may be extracted from them, applicable to this case especially, but indeed embracing the subject at large, it will be better to take the authorities in succession.

Spencer's Case, 5 Rep. 16 *a.* was an action by the lessor against the assignee of the lessee, upon a covenant by the lessee, for himself, his executors and administrators, that he, his executors, administrators, or assigns, would build a wall on the premises demised. So, at least, is the statement of the case, and so it has always been taken, particularly in the excellent abstract of the resolutions given in *Bally v. Wells*, 3 Wils. 25; (see also the Notes of Lord Chief Justice Wilmot's Opinions and Judgments, p. 341;) although the second resolution is somewhat ambiguously worded. It is there laid down, that if the covenant had been for the lessee and his assigns, the assignee would have been bound by the covenant to build on the land demised, because he was to take the benefit of it; but that he would not have been bound, had it been to build on land of the lessor, not parcel of the demise. It is hardly necessary to inquire whether this resolution would have supported such a covenant as the present, had it

been in a lease, and the action brought on the reversion against the lessee's assignees; but, assuredly, the covenant for carrying off the produce of a farm or mine by a particular way, and on certain terms, must be allowed to have a very different annexation to the land from the covenant to build upon it. Such a covenant as the former can with difficulty be said to be annexed to and inherent in the thing demised, and certainly is not in support of it.—Lawrence *Pakenham's Case*, in the Year Book, 42 Edw. 3, fo. 3, is referred to by Lord Coke, in his report of *Spencer's Case*; and it was an action of covenant by the feoffee of a manor against a prior and convent, on a covenant with the feoffor to sing in a chapel, parcel of the manor. It appears by the book, that it had been a chauntry time out of mind; and it is not stated whether the convent, too, was on the manor, or had lands by grant from the lord; but it is admitted, both there and in another case, (*Horne's Case*, also in the Year Book, 2 Hen. 4, fo. 6,) that the covenant would not have run with the land, had it been to sing in a chapel not belonging to the covenantee. Upon this case of *Pakenham* it may be observed, that the covenant was by a corporation, and consequently no question arose as to its binding the assignee of the covenantor, but only whether it ran with the land in favour of the covenantee's assignee. Then the Chief Justice, in the course of the argument, took a point of the plaintiff being, though a feoffee, yet of the blood of the covenantee, his grandson, and who might be his heir. But, lay-

ing these things aside, could it be maintained now that a covenant by the purchaser of a messuage within a manor, to exercise any trade there, beneficial to the lord or his tenant, as continually to keep school, or continually to have a blacksmith's or other shop, could be sued upon by the purchaser of the manor? Nay, more, that such covenant would run with the land, though made, as in *Pakenham's Case*, by a party or a corporation who were not purchasers of the messuage?—nay, as must be contended in order to make that case applicable to this, that the lord or his vendee of the manor could sue any one who might at any distance of time become, by purchase from the covenantor, owner of the messuage, for not exercising thereon the stipulated trade? In a word—will the law recognise that a house should be devoted to this or that trade, and there should be impressed upon it, into whose hands soever it may come, the obligation to carry on the trade for the benefit of the manor, or of the other property of the party covenantee, to whom the house originally belonged? The law cannot do so without sanctioning the creation of a new species of tenure, by means of such covenants.—*Uxbridge v. Staveland*, 1 Ves. sen. 56, arose upon a covenant in a lease; but the opinion of Lord Hardwicke is merely an obiter dictum; the covenant on which he decided being held not to run with the land. It is not only “obiter,” but the opinion is faintly stated. Had it been covenanted, said his Lordship, to grind all the corn they should spend ground at the lessor's mill, it might relate to the

premises, and running with the land bind the assignee. But he afterwards adds, setting all this aside, and supposing it would bind the assigns, they ought to be shown to be assigns, which was not done. Even therefore in the case of such a covenant as he supposes occurring in a lease, and upon a question with the reversioner, this is but a faint authority.—I shall mention *Vyvyan v. Arthur*, 1 Barn. & Cress. 410, next, because it relates to a similar covenant, and must, I think, be allowed to go further than any other case of the kind. It was the case of an action of covenant by the devisee of the lessor against the personal representative of the lessee, upon a lease, containing, in the reddendum, a reservation of suit to the lessor's mill, by grinding there all the corn grown upon the land demised; which mill the lessor had devised to the plaintiff along with the reversion of the land demised. The Court decided that the action lay, upon the ground that both the mill and the reversion were in the ownership of the assignee of the covenantee. Mr. Justice Bayley expressly says, that his judgment is founded entirely upon this unity of title; and Mr. Justice Holroyd adopts nearly the same view, regarding the thing to be done as a rent-service to the lessor by the tenant. And here I may as well notice the objection that was there raised, that the thing required to be done by the covenant, was not to be done upon the land demised, which is supposed to oppose a difficulty in such a case. But I do not think that there is this difficulty; for service may be per-

formed off the premises, as by plowing the lord's land, or sheering 100 of the lord's sheep. The difficulty is to say, what would become of the service if the mill and manor were disunited : and I am disposed to think that Mr. Justice Holroyd got over this difficulty rightly, in the case under consideration, by saying, that the service was to be rendered as long as the mill was owned by the owner of the reversion ; and such indeed might be considered as implied from the nature of the reservation. So long, then, as the rent-service was payable, (that is, while the mill was so owned,) the rent, and consequently the action of covenant, passed with the reversion. But that case of *Vyvyan v. Arthur* is clearly distinguishable from the present case, for there was a reversion, to which a service might be annexed ; such service being rendered to the lessor, and beneficial to him ; and besides it was included in the reddendum. It is indeed difficult to reconcile this decision with *Spencer's Case*, and the others which hold that the thing to be done must be on the demised premises ; and it is equally hard to avoid suspecting that the peculiar nature of the thing in question,—grinding at a mill of the lessor,—had some influence upon the Court in supporting this covenant as real. The idea of a lord's mill, with which we are familiar, and of the mill service due from the soke, not unnaturally mixes itself with the consideration of such cases, and leads us to forget, for the moment, the origin of that service in the feudal relation of the lord of the manor and the mill, and the tenants of the

manor: Accordingly the Court speaks of "rent service," and says that this was in the nature of such a render. Perhaps cases might be put in which a covenant by the lessee would not have been so certainly held real. Suppose it had been to carry all the cattle or poultry raised on the farm to a market where the lessor had piccage and stallage, or to purchase all cloth used upon it at the lessor's shop—it is not necessary for supporting the view I take of the case at bar, to determine whether in a lease such covenants would have been collateral; but it would probably have been found more difficult to hold them real, as being in the nature of rent-service, than where the obligation, as in *Vyvyan v. Arthur*, referred to grinding at the landlord's mill. *Sampson v. Easterby*, 9 Barn. & Cress. 505, and 6 Bing. 644, went upon the assumption that the lessor had a right to erect buildings on the waste, and that, when erected, they became his. The Court therefore held that the lessee's covenant (or rather implied covenant, for there was none per directum,) to build on the waste ran with the mineral demised, because such building was wholly connected with the mines, and tended to their support, the building he was bound to raise being a smelting-house. In *Tatem v. Chaplin*, 2 H. Blacks. 133, a covenant to reside in the premises demised during the term was held to bind the assignee, though not named, on the authority of the first and sixth resolutions in *Spencer's Case*; being quodammodo annexed and appurtenant to the thing demised, and plainly

tending to support it. Suppose there had been no demise, and no privity by the reversion—could a covenant to reside in a given messuage bind assignees of a purchaser, and be sued upon by the seller of the messuage? In other words, can a man, by a covenant with a seller of a house, bind all who may ever live in that house after he shall have sold it, and his vendees sold it over and over again, to reside constantly in it? The question answers itself, but it also marks the distinction between such cases and the one at bar. An observation similar to the above arises—in *Jourdain v. Wilson*, 4 Barn. & Ald. 266, which was the case of a covenant to supply the houses demised with water at a given rate; in *Vernon v. Smith*, 5 Barn. & Ald. 1, where an act of parliament had as it were connected the covenant to insure with the reversion, by directing the money recovered from the office to be bestowed on the demised premises; and in the case of *Bally v. Wells*, already noticed, in which there was a covenant by the lessee of tithes, not to let the farmers of the parish have any of their tithes without leave of the lessor, who was the parson. The Court held this to be a covenant to compel whoever had the perception of tithe to take in kind, for the purpose of excluding circumstances that might be made the ground of setting up moduses; they considered such a covenant as only prescribing a mode of managing or occupying the thing demised, likened it to an obligation to spend the muck on the land, and regarded it as clearly tending to support the estate; but they added, what is very

material for our present purpose, "here is a reversion in the lessor, and a privity between him and the assignee." Accordingly in the same spirit Lord Kenyon, when delivering the judgment of the Court on the much-contested and well-considered case of *Webb v. Russell*, 3 Term Rep. 393, plainly said that it is not sufficient that a covenant is concerning the land, but in order to make it run with the land there must be a privity of estate between the covenanting parties. Whether he would have held the privity to be sufficient which existed in *Vyvyan v. Arthur*, by the unity of title in the lessor's assignee of the premises demised, and those where the thing was to be done, it is not necessary here to inquire. At least it may be said that there was in that case the privity of the reversion. Nor is it, perhaps, very easy to reconcile the principle of that case (*Vyvyan v. Arthur*) with the *Mayor of Congleton v. Pattison*, 10 East, 130, where the thing to be done was upon the demised premises, although the interest to which that thing related was not immediately and directly in the lessors. The lessee there had covenanted for himself, his executors and assigns, not to hire persons to work in a mill who were settled in other parishes without a parish certificate. But it is of more importance to observe that the present question cannot be determined one way, viz. in favour of the covenant binding the assignee, if that case of the *Mayor of Congleton v. Pattison* is law, which never has been doubted. This will appear still more plainly if we look at a case in the Common

Pleas, decided upon its authority, *Collison v. Lettson*, 6 Taunt. 224. That was a covenant by the lessor, owner of a parcel of land near the premises demised, for himself, his heirs and assigns, to give the lessee, his executors and assigns, the pre-emption of the neighbouring land not demised. The lessor sold both the demised premises and the neighbouring parcel of land without making any offer to the covenantee, and it was held no breach of the covenant; but in the course of the argument the ground that the covenant ran with the premises demised appears to have been abandoned, and it was admitted that it was collateral, upon the authority of the *Mayor of Congleton v. Pattison*,—a proposition to which the Court assented. So if the case had been reversed, and the lessee had covenanted to give pre-emption of other land to the lessor, it follows that the assignee of the lessee, though also owner of that other land, would not have been bound by the covenant. In deciding *Bally v. Wells*, the Court appears to have felt the force of *Purfrey's Case*, Moore, 243, Godb. 120, and they avoided it by showing that the covenant supported the thing demised and concerned the mode of occupying it. There a man having a term in a tavern leased it for three years, and the lessee covenanted to account monthly for the wine sold; and it is plain, from the manner in which the Chief Justice alludes to this case, that he would have found it much more difficult to evade its force had he been deciding, as in *Vyvyan v. Arthur*, that a covenant to do something with the produce of the demised

premises on premises not demised, bound the assignee of the lessee, or could be sued upon by the devisee of the lessor. I have said nothing of the case of the *Duke of Bedford v. The British Museum*, because the point analogous to the present was not there decided. Having been favoured with a note of what passed upon the appeal motion in that suit, I find that Lord Eldon carefully guarded against being supposed to give any opinion on the question whether or not the covenant ran with the land. The decision turned upon another view of the case, which prevented the question going to a Court of Law, as the Vice-Chancellor had directed; but I have reason to believe that upon the question whether the covenant ran with the land, the opinion of the common law Judges was consistent with the principles I am now maintaining. It is unnecessary to go into the discussion of the covenant in brewers' leases, to take beer only at the lessor's brewery. I am not aware of any decision having ever authorized the position that such a covenant binds the assignee of the lessee. Lord Kenyon having occasion to mention the subject at *Nisi Prius*, in *Hartley v. Pehall*, 1 Peake, 131, said that it was a question of some nicety, but he was not called on to decide it; and in *Doe v. Reid*, 10 Barn. & Cress. 849, the learned judges, as far as they handle the question, appear to think that such covenants do not run with the land. Lord Tenterden apparently guards himself against being supposed to hold that they do; and Mr. Justice Bayley expressly says, upon the question whether

the covenant in question runs or not with the land, "I think it would be very difficult to show that the *Mayor of Congleton v. Pattison* does not govern this case." As the law at present stands, I have no hesitation in saying that whoever would make sure of the benefit of such a covenant, must provide against assignment without licence, which may enable him to renew the covenant with the assignee of the lease.

A careful examination of the authorities, then, confirms the view which I set out with taking of the subject upon principle; and shows that such a covenant as the one in question could only with considerable difficulty be held to run with the land, if there existed between the original parties to it, the covenantor and covenantee, that privity which the enuring right of reversion creates between the lessor or his assigns and the assigns of the lessee;—that the cases, taken altogether and sifted, are adverse to such a covenant being real and inherent even in that case of privity;—but that where no privity of the kind can be pretended to exist, as in the present instance, the covenant is plainly collateral, and binds not the assignees.

If such would be its construction at law, does the notice which the purchaser had of its existence alter the case in this Court upon an application for an injunction; or would it upon the application of a correlative and co-extensive nature, for a specific performance? Certainly not.

A case like this bears no analogy at all to that of purchase with notice of a prior agreement to sell the same premises to another. Such a

purchaser has done an unconscientious act, or at least made himself accessory to the unconscientious act of his vendor in selling another man's property, and therefore his bargain cannot protect him against the prior claim. But that of which he had notice was the legal valid act of the vendor; whereas that of which the assignees here had notice, was their assignee's covenant, affecting to bind the land, on which by law it could not operate.

The knowledge by an assignee of an estate that his assignor had assumed to bind others than the law authorizes him to affect by his contracts—that he had attempted to create a real burden upon property which is inconsistent with the nature of that property, and unknown to the principles of the law—cannot bind such assignee by affecting his conscience. If it could, then the illegality would be of no consequence; and however wild the attempt might be to create new kinds of holding, and new species of estate, and however repugnant such devices might be to the rules of law, they would prove perfectly successful in the result, because equity would enable their authors to prevail; nay, not only to compass their object, but to obtain a great deal more than they could at law, were their contrivances ever so accordant with strict legal principle. This Court would be occupied in compelling persons to perform, by way of injunction and decree, covenants which the law repudiated, and for the breach of which no damage could ever be recovered. Observe how this would apply to all assignments of leasehold. Every assignee of

a lease has notice of the covenants with the lessor; consequently no covenant, how absurd soever, could be made by a lessee that would not of necessity run with the land in equity, into whose hands soever it came; and all the determinations that have been made by the Courts of such covenants being collateral or in gross, would be of no avail, because though no damages could be recovered for their breach, yet the performance of them could be enforced on every assignee of the term as a party necessarily fixed with notice. So a person who had conveyed land and subjected it to covenants in the hands of his vendee, could at once make sure of those burdens following it into the hands of all holders to whom it might pass, by taking the precaution of notifying the covenant in some effectual though easy manner, as by publication in some place near the premises where the purchaser must needs observe the announcement. It is clear then that this Court will never interfere by way of injunction, or in any other more direct manner enforce such covenants, when satisfied that they could receive no support or countenance at law.

It is manifest therefore that the case for this injunction fails upon these grounds, either of which is sufficient to support the decision. First, that the agreement was in violation of the provisions and policy of the local act; and secondly, that the covenant on which the relief is claimed runs not with the land, and binds not the assignees. Therefore the Injunction must be dissolved.

EARL OF RIPON *v.* HOBART.

THE facts disclosed by the judgment are all which are material for understanding the points.

LORD CHANCELLOR.—This application was by the General Commissioners of the Witham Navigation, for an injunction to restrain the Nocton Trustees from erecting or using any steam-engine or engines, for throwing off the water from the low lands of three parishes under their management into any drains communicating, directly or indirectly, with the River Witham; or, in the alternative, from using any such engine thus throwing off the water, so as in any manner to injure the banks of the River Witham, or interfere with the drainage of the lands lying lower down the river than the Nocton lands.

We may easily dispose of the second branch, or alternative, in the outset. There is now before the Court a mass of affidavits and counter-affidavits extending to seven sets, and containing the representations of opinions, with the facts and alleged facts and reasons on which they rest, formed by skilful professional men, as well as other persons, chiefly directed to determine this question, Whether any use that can be made of the engine erecting by the Nocton trustees will prove detrimental to the navigation of the

Jan. 29, 1834.

Application for injunction against the erection or use of a steam-engine, from an apprehension of damage to the banks of a river and of interference with the drainage of lands, refused.

Principle which guides the Court in cases of alleged irreparable mischief.

Its reluctance to interpose by injunction in cases of nuisance.

Witham? That engine is of a forty-horse power, and equal to twenty-seven windmills, and capable of raising the water nine feet instead of four, the height to which it is now lifted; and there are about as many witnesses to support the one side of this question as the other. Nay, it would be easy to find respectable testimony among the witnesses for the defendants, which would go far to prove, that there was hardly any steam power which could injure the navigation; while the evidence for the plaintiff would justify us in concluding, that hardly any change could be made in the power at present used, without damage to the river banks and the drainage of the lower lands. To illustrate this, we need only observe, that in the very first affidavit, Mr. Rogers having sworn that the Nocton trustees had given notice of their intention to erect and use a steam-engine for the more effectually draining the low lands by throwing the water into the delph—although he says not a word of the size or power of the engine, nor of course any thing of the degree in which the drainage of the Nocton lands will be rendered more effectual by the engine, and of the quantity of additional water which will be thrown by means of it into the Witham—yet Sir J. Rennie, who joins in the same affidavit, swears immediately after, that the erection and use of such steam-engine by the said trustees will do great injury to the banks of the Witham; “such steam-engine” being merely “a steam-engine,” mentioned by Mr. Rogers without the least specification of its power. No doubt Sir J. Rennie

afterwards shows, that he is assuming such a steam power to be used as will greatly increase the rapidity of the Nocton drainage, but he thinks the Witham banks are barely sufficient to support the present pressure in times of flood; so that, strictly speaking, according to him, any increased body of water would be dangerous. It is not however necessary to show that some opinions, on the one hand, would prove any new engine that could be erected and any use of it dangerous; while some, on the other hand, going to the opposite extreme, would prove that almost any change in the Nocton drainage would be safe. The conflict of those opinions is undeniable; and evinces the impossibility of any one being able to tell beforehand whether any given change proposed to be made is or is not such as in any manner to injure the banks of the Witham, and interfere with the drainage of the lower lands. What purpose then could such an injunction serve as the second alternative of the motion describes? It would give no information; it would prescribe no rule or limits to the defendants; it could not in any manner of way be a guide to them, if it did not operate as a snare. It would in reality amount to nothing more than a warning, that if they did any thing which they ought not to do, they would be punished by the Court, but leaving to themselves to discover what was forbidden and what allowed. If, after receiving such a warning, they acted upon the opinion of impartial and experienced professional men, and yet some damage followed, this Court could not visit them very severely. The

parties injured might indeed then recover damages at law, having leave to sue; but so they may of course recover damages if no injunction be granted, and without asking the Court's leave to sue. I can see no ground whatever then for granting an injunction of this description, which fails in the very point that forms the ground of the relief—the preventing of irreparable mischief. In the present case, till the event happens, no man can take upon him to say with confidence, upon such evidence as we have here, whether or not mischief will happen from any given change of machinery; so long, at least, as that change does not go to some length, so great as to be extravagant, and to which no one supposes the party would think of proceeding.

But it may be said, the uncertainty, the ignorance in which the party will necessarily be, and the risk he will run of being in contempt, should the event prove his operations to be injurious, will prevent him from doing any thing: he will follow the homely maxim of standing still in the dark, or of doing nothing when you know not what to do. Then, if so, this is obtaining the first of the two alternatives, under colour of asking the second; for it makes the injunction amount to a restraining from erecting or using any steam-engine at all; and undoubtedly if such would be the consequence, as it very possibly might, of the qualified restraint, it is far better to grant the injunction openly and directly, and in plain terms; that is, to prohibit all such works at once by giving the first alternative. Let us then

consider whether or not such an injunction ought to go—an injunction to prevent the erecting or using of steam-engines.

To this an objection has all along struck me as important, and indeed decisive of the whole question. It is not a thing in itself injurious or noxious that is sought to be restrained, but a thing which may or may not be so—the erection of steam-engines—because it is apprehended that the working of those engines will injure the navigation of the inferior districts. The intention to erect the engines is not indeed denied; notice was formally given of it. But the erection of the engines is not the doing of the damage. It may give the Nocton trustees a power of mischief with which their present machinery does not arm them; it may put into their hands an instrument with which they may be enabled to work mischief; but can this with any correctness be said to be in itself damage? There is nothing strained in the supposition that they may raise by steam only so much water as they now raise by wind power; that is, they may never in the course of any day raise more water, though, from the greater excellence of the engine, its more entire obedience to control, and the more equable effect which it produces, they may be enabled to work at all times when its services are wanted, and possibly to drain off, in the course of a year or a month, a much greater body of water, but to draw it off without the possibility of damage to any one; and, in like manner, if the raising of the water to a height beyond what can now be gained is the

cause of mischief, it is not certain that they will do so. If indeed this be a work which not only gives the power of doing mischief, but cannot be used, or can hardly in the common course of things be used, without working mischief; if, in short, it be a thing which can scarcely be used without being abused—the case comes to be very different. For in matters of this description, the law cannot make over-nice distinctions, and refuse the relief, merely because there is a bare possibility that the evil may be avoided. Proceeding upon practical views of human affairs, it will guard against risks which are so imminent that no prudent person would incur them, although they do not amount to absolute certainty of damage. Nay, it will go further, according to the same practical and rational view; and, balancing the magnitude of the evil against the chances of its occurrence, it will even provide against a somewhat less imminent probability, in cases where the mischief is vast and overwhelming should it be done. Accordingly, if it appeared that the works here in question could hardly be used without damage to the inferior districts, I might hold that erecting them was in itself a beginning of injury, though there might be a possibility of otherwise using them; and if the damage, should it happen at all, were the destruction of the navigation, and the subjecting of the lower districts to a deluge, I might scrutinize less narrowly the probability of the engines being injuriously worked. But upon carefully examining the evidence in the case; and, indeed, it might be enough to say, upon atten-

tively considering the nature of the case—the kind of works and of working in question, and the sort of mischief apprehended from it—there is no reason for holding that the danger is either certain or very imminent; or that mischief of a very overwhelming nature is likely to be suddenly done; or, indeed, that any serious injury can be done, without time being afforded for coming to the Court with a case free from the present defects. I shall not enter into the particulars of the evidence, as I agree with his Honor, the Vice-Chancellor, in the conclusion to which he came. But I cannot help remarking that there is some security afforded by the very nature of the engines complained of, and the use of which is made the ground of the plaintiff's apprehension. If it is of far greater power than the old machinery, it is also far more easily controlled. It may be an instrument of mischief, beyond any that the present number of windmills could produce; but its force is so perfectly manageable, that they who work it, and not the engine, will be to blame if mischief happens. What is the necessary inference? Plainly this. First, That the engines which are objected to, do not unavoidably, and as it were of themselves, and merely because they are made and used, produce the evil apprehended, but that something more must be done voluntarily and deliberately by the owner beyond the mere putting of them in motion. And next, that if those owners do act thus, and find there is actual damage doing or beginning to be done, they have the power of instantly stopping, and, by adjustment of the force

used, putting an end to the evil; and if they stop it not, then that the other party may apply to the Court. To such an application there will then be no possibility of answering that the expense was already incurred of erecting the engine, and that this should not have been suffered by the general commissioners; for the present proceeding has given sufficient warning: and besides, if the ground upon which this injunction is refused is a sound one, they were not bound to prevent any steam-engine from being erected, but only to restrain such a use of it as destroyed the navigation.

But now if that ground is denied or deemed insufficient, and if this is a kind of mischief, such as to consist in the erection of the engine, and not in the mode of working it, then it follows that this must be so treated throughout. Have the plaintiffs so treated it? Taking that view of the question, and which is of necessity their view of it, have they so proceeded as to give them a right to the assistance of this Court? It appears to me that they have not. As early as the 14th September, 1832, the Nocton trustees gave the general commissioners notice that they intended to erect a steam-engine. At their next meeting, which was in October, the commissioners passed a resolution to oppose it, and announced this to the trustees. In February they served a more formal notice that they should proceed if the trustees went on according to their intention. This proves that the commissioners did not in February regard that intention as abandoned, although nothing had apparently been done during the five months that had elapsed

since the notice of September. They however suffer four months more to elapse before they file their bill, alleging now that their notice was only that they should proceed, if the trustees went on. But surely they must have known that the trustees might have been going on all the while making preparations, incurring expense and entering into engagements, although nothing outwardly appeared. A formal notice had been given in September, and that was unrevoked ; nothing whatever was done, or written, or said, that indicated an abandonment of the intention then notified. And when the bill is filed the commissioners state, and it is also sworn in their affidavits, that the trustees had been marking out the ground and making contracts. This they suffered to be done by delaying their proceeding. But they appear subsequently to have evinced a yet greater disregard of the nature of their only ground for obtaining the relief sought—namely, the imminent peril necessarily resulting from the engine, in whatever way it might be worked ; or, which is the same thing, the inevitable certainty of the trustees working it so as to injure the navigation. According to that view any delay that enabled the trustees to erect the engine and keep it going during the autumnal and winter months, was most mischievous to the navigation and lower lands,—was all but fatal to them ; and yet we are here disposing of the motion at the end of January, when there has been rain enough certainly, but by the extraordinary course of the season no snow—which is one accident not to be reckoned

upon—and another accident, the blowing down of a chimney, has alone prevented the engine from being in work. This delay has certainly been owing more to the plaintiffs than the defendants; for it was because they were not ready with some of their affidavits, from the 20th July to the 8th August, that the motion stood over the long vacation, and that the defendants were released from their undertaking not to go on with the building. Those affidavits which caused the delay were not filed till the 22d October, and some of them not till the 5th November, which of course occasioned further delay for the defendants to answer; and the result of the whole was, that the question could not come on for discussion before the 20th December, after considerable progress had been made in the works and sums of money been expended upon them, independent of contracts being entered into at the earlier period. The danger apprehended in the case of the *Birmingham Canal Company v. Lloyd*, 18 Ves., 515, was one of a very serious nature—that of draining off the water from a great reservoir of that canal. But Lord Eldon refused the injunction, leaving the Company, as he said, to take their chance at law, because they had delayed coming to the Court till two years after the notice from the defendants. Here indeed the delay was only nine months. There was, however, a counter notice in that case as well as in this, and it made no difference in the consideration of the Court as to the party's laches. Lord Eldon there added, “they must establish their right to damages at law before they can have this injunc-

tion :” so that he held their delay to have been sufficient to deprive them of the preventive relief altogether, inasmuch as the damage must in great part have been done before they could obtain their verdict, and again come to this Court. But the conduct of the plaintiffs here gives rise to the further remark, that in a case of this kind, where the application is not against an admitted nuisance, but a work which may or may not be noxious, according to circumstances, the party alleging mischief has no middle course between coming in the very first instance, or waiting until he can satisfy the Court, by a verdict at law, that he is right both as to his title and as to the mischief.

In considering more generally the question which is raised by the present motion, I certainly think we shall not go beyond what both principle and authority justify, if we lay down the rule respecting the relief by injunction, as applied to such cases as this. If the thing sought to be prohibited is in itself a nuisance, the Court will interfere to stay irreparable mischief without waiting for the result of a trial ; and will, according to the circumstances, direct an issue or allow an action, and, if need be, expedite the proceedings, the injunction being in the meantime continued. But where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may according to circumstances prove so, then the Court will refuse to interfere until the matter has been tried at law, generally by an action, though in particular cases an issue may be directed for the satisfaction of the Court

where an action could not be framed so as to meet the question. The distinction between the two kinds of erection or operation is obvious, and the soundness of that discretion seems undeniable, which would be very slow to interfere where the thing to be stopped, while it is highly beneficial to one party, may very possibly be prejudicial to none. The great fitness of pausing much before we interrupt men in those modes of enjoying or improving their property, which are *primâ facie* harmless or even praiseworthy, is equally manifest; and it is always to be borne in mind, that the jurisdiction of this Court over nuisance by injunction at all is of recent growth, has not till very lately been much exercised, and has at various times found great reluctance on the part of the learned judges to use it even in cases where the thing or the act complained of was admitted to be directly and immediately hurtful to the complainant. All that has been said in the cases where this unwillingness has appeared may be referred to in support of the proposition which I have stated, as in the *Attorney-General v. Nicholl*, 16 Ves. 338; *Attorney-General v. Cleaver*, 18 Ves. 211; and an *Anonymous* case, before Lord Thurlow, in 1 Ves. jun., 140, and others. It is also very material to observe, what is indeed strong authority of a negative kind, that no instance can be produced of the interposition by injunction in the case of what we have been regarding as eventual or contingent nuisance. But some authorities approach very near the ground upon which I have relied. Lord Hard-

wicke, in *Attorney-General v. Doughty*, 2 Ves. sen., 453, speaks of *plain* nuisances and a *plain case* of nuisance, as contradistinguished from others, and entitling the Court to grant injunction before answer. Lord Eldon appeared at one time—(*Attorney-General v. Cleaver*)—to think that there was no instance of an injunction to restrain nuisance without trial. But though this cannot now be maintained, it is clear that in other cases where there appeared a doubt, as in *Chalk v. Wyatt*, 3 Mer. 688, the injunction was said only to be granted because damages had been recovered at law. The course which has been pursued at law with respect to different kinds of obstructions and other violations of right, furnishes a strong analogy of the same kind. Lord Hale, in a note to Fitzherbert's Nat. Brev. 184 a, speaking of a market holden in derogation of a franchise, says, that if it be kept on the same day, it shall be intended a nuisance, but if it be on another day it shall be put to issue whether it be a nuisance or not; and the case of *Yard v. Ford*, 2 Saund. 172, seems to recognise the same distinction.

Upon this view, then, of the question, it seems impossible to grant the injunction. But advert-
ing to the circumstances of the case, the conduct of the parties both before and since the cause came into Court, and the conflict of opinion which the evidence unquestionably discloses among the professional men, the inclination of the Court would naturally be this, independent of the objection to which I have mainly adverted. There can be no satisfactory way of determining on which side

the true opinion is given, without actual experience. A trial at law might, probably would, by the examination of witnesses, and the view afforded to the jury in the company of skilful and experienced persons, throw important light upon the subject. Nevertheless, the only means of attaining certainty in the discrepancy of learned opinions, is actual experience. If the waiting for that might by any proximate possibility endanger such irreparable and extensive damage as some of the witnesses speak of, the inducement would be strong to grant an injunction in the meantime. But there does not, upon the whole result of the evidence, appear to be such a reasonable ground of apprehension as imperatively to call for this course here. Then, if so, we are to regard the consequences of granting the injunction. They are by no means to be compared with those of shutting up a colliery or other mine which may be flooded, or a trading concern, which may be from its nature destroyed for ever, if suspended for a month. Nevertheless such consequences are not to be put out of view. The engines have been erected, and the order would prevent them from working, and that after the money had been invested in their construction, in consequence of the plaintiffs doing nothing from October to February but repeat a notice, and nothing at all from that notice till June, although aware in September of the intention to build the engines, and not apprized afterwards by any act or any communication that the intention was abandoned.

All this leads to the conclusion that things should be suffered to continue as they now are.

It is in vain, I know full well by experience, to suggest what would be the most advisable course for all the parties to pursue, with a view to attain what ought to be their common object—a termination of these proceedings, and the enjoyment of their several rights without further litigation. Nevertheless, I will once more make the attempt, because in this case there are on both sides persons of the greatest respectability, acting too in some degree as public functionaries, for the benefit of others whose interests they protect; and they may be said rather to be contending for the power to perform their public duties than for liberty to enjoy their private rights. They would do well to agree upon some person in whom they could repose confidence, and who being resident on the spot should be entrusted with the discretion of pronouncing when the new machinery appeared to be producing injurious effects, and directing its working to be relaxed or suspended; the cost of his employment, and of his occasional inquiries by the aid of other men of skill, to be borne by the opposite party, the plaintiffs in the cause. Or, if there should be a repugnance to delegating such powers, that he should at any rate be the person to determine when an application to this Court should be renewed. For at all events, this is not a case in which the suit will be put an end to. Both the Vice-Chancellor, by what I can collect of his Honor's opinion, and certainly myself, are clear, that though the in-

junction is refused, there must be an opportunity given to try the whole question at law, supposing no arrangement of another kind can be come to. It is, however, very possible that all proceedings in Courts or out, may be found ineffectual to settle the powers and the rights of the parties, and that resort must be had to the legislature for another Act to regulate them.

The counsel afterwards informed the Court that the suggestion contained in the preceding page had been considered, but that no arrangement could be come to. His Lordship refused an application for an issue.

EASTWOOD v. GLENTON.

MR. PEPPYS moved to discharge, on account of some irregularity, an order for the taxation of a solicitor's bill of costs, which had been made in the usual way, *ex parte*, upon a petition presented to the Master of the Rolls. Mr. Bethell suggested that the Lord Chancellor could not entertain the application.

Jan. 31, 1834.

The Lord Chancellor has jurisdiction to discharge upon motion an order of course obtained at the Rolls upon petition.

Understanding of the Court that such applications be not entertained for the future.

LORD CHANCELLOR.—The cases cited as precedents were *Bishop v. Willis*, 2 Ves. sen. 113, and *Clutton v. Pardon*, 1 Turn. & Russ. 301. The former was not an express decision in favour of the practice, as it is a case in which the order had been made, counsel on both sides having been heard, but Lord Hardwicke recognized the practice of moving to discharge orders of course. In the latter case, an order, as of course, had been

obtained for taxation of a solicitor's bill, upon a suppression of the fact that a former order had many years before been obtained for taxation as between solicitor and client. The defendant's solicitor had been paid after a long interval, and he made an offer to deliver up deeds, which was refused. The order was for re-taxation, which is not of course, and could only have been obtained on suppression of the facts. I have found another case, *Jones v. Sarby*, 1 Swanst. 194 n., where an order of course having been obtained at the Rolls by petition, Lord Eldon, on motion, discharged it for irregularity. The order was for time to answer, after a demurrer overruled; and Lord Eldon held it clear that this was a special application. It is probable that there had been a suppression of the fact in the petition, viz. of the demurrer having been over-ruled. But it is also possible, that a mistake had been committed by the secretary at the Rolls, in taking it for an order of course. If so, this, though not in form, was in substance an appeal, and an appeal from the Judge who signs such an order of course, and neither hears any party, there being only one party indeed, nor knows any thing of it. There seems every reason why such applications should be addressed to the Court which made the order, or is supposed to make it, and which ought to protect its officers, and can best visit the party with whatever penalty his irregular or culpable procedure may deserve. But it is agreed by their Honors, the Master of the Rolls and the Vice-Chancellor, with whom I have conferred,

that there is jurisdiction here to entertain such application, and by way of motion. They are not indeed appeals, for there is not properly any order to appeal from ; neither are they re-hearings, for there cannot, except in contemplation of law, be said to have been a hearing by the Judge below. But the party, on his own statement, obtains what he is entitled to, if his statement be correct, and what, if it be incorrect, no other party can be heard to resist ; and he makes his statement on his own responsibility, and takes the order at his own peril. Where the order is not on petition, but by motion, that is, by handing in the brief, the party is bound by what is indorsed on it. It is only in a very strict and technical sense that the Court, by making such an order, can be said to hear and determine, or to act otherwise than ministerially. Nevertheless it may, in contemplation of law, be said so to act.

But though we are all agreed that there is jurisdiction to discharge such orders here, we think the inconvenience manifest of moving in one Court to discharge such orders made in another ; and we have come to the understanding that such applications should not be entertained. Whether or not it may be advisable to make any general order to this effect, it is unnecessary to consider. The very rare occurrence of such motions sufficiently shows the sense entertained of their inconvenience, and we have no doubt that the course which we all agree in recommending will be adopted. With respect to this motion, as it

has, though improperly, been made here, and counsel are instructed, it will be disposed of, as soon as they renew the application upon the merits, into which they did not go before.

HARDMAN v. ELLAMES.

THIS was an appeal from a decision of the Vice-Chancellor overruling a double plea. The judgment sets forth at length the material parts of the bill and the pleas.

Mr. Knight and Mr. Jacob for the plaintiff. Sir E. Sugden and Mr. Booth for the defendant Ellames.

LORD CHANCELLOR.—The bill states that John Hardman, by his will, dated 1st November, 1754, devised his moiety of the manor of Allerton, and other premises, to his issue, and, in default of issue, to his executors, for 99 years; and subject thereto to his nephew, John Hardman, for life; remainder to his issue in tail; remainder to his nephew, James Hardman, for life; remainder to his issue in tail; remainder to his the testator's own right heirs for ever; and that he appointed his wife Jane, Jane Hardman, the widow of his brother James Hardman, and James Perceval, his executors; and that the trusts of the term were for making jointures for the widows of the nephews and other persons to become entitled to the estates, and for making provision for their younger children. The bill further states the death of the testator in 1755 without issue,

Feb. 3, 1834.

Plea that the possession and the receipt of rents have been "*adverse*" to the plaintiff since 1759, overruled from its generality, regard being had both to the intrinsic meaning of the word and the statements of the bill.

The bill containing a charge that the defendant possessed documents showing the particular matters alleged, such a plea further defective, because not accompanied by an answer denying such possession.

Assertion sometimes made that rules of pleading are less strict in equity than at law.

and that Jane Hardman, the widow, and Jane Hardman, the sister, who alone proved the will, entered into possession of the testator's moiety of the estate, and continued in such possession during their lives; that they or one of them was, or claimed to be, entitled to the other moiety of the premises by a distinct will; that they and the survivor of them granted leases of various parts of the premises, one of which leases did not expire until 1815: that Jane Hardman, the sister, died in 1793, and Jane Hardman, the widow, in 1795; and that T. Earle and other persons, the executors of the latter, thereupon took possession of the testator's moiety of the said premises, and continued to receive the rents, or some part thereof, until subsequently to the year 1815: that T. Earle died in 1822, and that the Earles, who are defendants with Ellames, were his executors, and the term of 99 years became and was vested in them; that Ellames, some years ago, became entitled to the moiety of the estates, which did not belong to the testator; and that some time after 1815, he entered into possession of the estates; and that although he at first accounted to the executors of Jane, the widow, for a moiety, yet that for some years past he had retained the whole in his hands: that the whole of the rents received by Jane Hardman, the sister, and Jane Hardman, the widow, were not applied according to, or wanted for, the trusts of the said term; and that the Earles had in their hands the surplus of such rents, which they were willing to pay over to the party entitled to the same: that the plaintiff was

the testator's heir at law, and that he had obtained letters of administration, which entitled him to the said surplus rents : that if Ellames has, as he pretends, purchased the estates, it was with notice of the testator's will, and of the right of the testator's heir under the limitations therein contained. The bill contains various charges, which it is not material to notice ; but, amongst others, it contains a charge that Ellames has in his possession deeds and other documents relating to the estates, and the title thereto, and the other matters aforesaid, and showing the truth of such matters, and particularly of the matters stated as to the plaintiff's pedigree ; and that Jane Hardman, the widow, and Jane Hardman, the sister, retained possession of the estates under the term of 99 years, and upon the trusts thereof ; and that many of such documents would show the particulars of outstanding terms which ought to be removed ; and that the plaintiff is the heir at law of the testator. The bill prays that it may be declared that the plaintiff, as the heir at law of the testator, is entitled to one undivided moiety of the estates, and that Ellames may be decreed to deliver up the possession thereof ; and it prays accounts of the rents of the moiety of the estates, or that the plaintiff may be at liberty to proceed by ejectment for the recovery of the moiety ; and that the defendants may be restrained from setting up outstanding terms, and for a receiver of the rents.

Ellames has, by leave of the Court, put in the two following pleas to the bill :—1st. That John Hardman, the nephew, survived James Hardman,

the nephew, and died in March, 1759; and that the title, if any, of the plaintiff, or of the party through whom by his bill he claims the moiety of the estate and premises, in respect of which he seeks relief by his bill, accrued on the death of John Hardman, the nephew; and that the possession of the moiety and the receipt of the rents thereof have been adverse to the plaintiff and the persons through whom by his bill he claims, ever since the death of John Hardman, the nephew. 2d. That the legal personal representatives of Jane Hardman, the widow, did not, nor did any of them, ever enter into possession or receipt of the rents of the moiety of the estates comprised in the term of 99 years, or any part thereof. Both these pleas have been over-ruled by the Vice-Chancellor; and I am of opinion that they were rightly over-ruled.

1. The mere general plea of "adverse possession," and still more, a plea, not only in those terms, but framed with the extreme generality of this plea, is without any warrant, either from precedents or from the rules of good pleading. The term "adverse possession," though of a known signification, is not used in pleading; and very rarely, I think only once or twice very recently, in the language of the statutes. I allude more particularly to the new Act for the Limitation of Actions and Suits relating to Real Property, 3 & 4 Will. 4, c. 27. It is a relative phrase, and it means such possession as is inconsistent with another's right; but it may consist in various things, and nothing can be more vague than an averment in bar of a right

claimed by A., that the thing over which it is claimed has been in a possession adverse to that right, without setting forth by whom such alleged possession has been had, or how, or in what manner it has been adverse. This plea gives no information to the party claiming, no notice of the defence he is to meet, and against which he is to prepare himself; for it may consist in various things, none of which are specified, and he is left to mere conjecture. It was at one time doubted by Lord Thurlow, whether a negative plea can be good; at least, he held in *Newman v. Wallis*, 2 Bro. C. C. 143, that a plea of "not heir," is bad, without averring who was the heir; but afterwards, in *Hall v. Noyes*, 3 Bro. C. C. 483, he altered his opinion, on the ground, no doubt, that the defendant might not be able to show who was the heir, though he might be able to prove that the plaintiff was not. But in that case the plea leaves the plaintiff in no uncertainty of the point of defence, and raises an issue, the affirmative of which is easily perceived, and at once refutes the negative issue of the plea. Upon such a plea as we have here, the plaintiff could not go to proof with any precise knowledge of what he had to meet, and might never discover it till he saw the defendant's evidence. It is not very easy to put a case of such a plea as this at law, because in ejectment, as the plaintiff must recover on the strength of his own title, and the Statute of Limitation is a bar to the right, and not merely to the remedy, it is not specially pleaded. But suppose it were, I cannot doubt that it would be bad to

plead merely that there had been continually, for more than twenty years before the demise in the declaration, a possession adverse to the title of the lessor of the plaintiff.

The analogy of all the cases in equity is, on these principles, against such a plea. In *Carleton v. Leighton*, 3 Mer. 667, the defendant pleaded a commission of bankruptcy duly issued, under which the plaintiff was duly found and declared a bankrupt, and thereupon his estate and effects were duly assigned and transferred; yet this was held a bad plea of bankruptcy, "because it did not plead distinctly and successively the material facts, but was in general language." Nor were the averments of the commission being duly issued, and bankruptcy being duly found and declared, held sufficient to exclude the possibility of the plaintiff not being in fact a bankrupt. In *Jones v. Davis*, 16 Ves. 262, the bill was for an account of stones taken from the plaintiff's quarry, upon promise by the defendants or their clerks, to keep an account of them, and to pay accordingly; and it alleged repeated assurances of the clerks of the defendants, that such accounts were kept. The plea was held bad for not denying the fact of such account being kept, though it denied that any promise was made to pay or to keep an account, or any thing to that effect; and it was held bad on the ground that the keeping of an account would have been evidence to go to a jury of a promise or agreement such as that stated in the bill. Yet it is to be observed, that the fact of the promise or agreement

is denied by the plea, and that the actual keeping of the account is not alleged in the bill at all, but it only alleges a statement made, that the same had been kept, which statement might have been untrue; and then, though possibly on another ground, the plaintiff might have prevailed, yet to the issue of agreement or not, that was not material. Again in *Evans v. Harris*, 2 Ves. & Bea. 361, the Court held a plea of the Statute of Frauds, denying explicitly any agreement in writing by the defendant, or any one authorized by him, or any memorandum or note in writing, to be bad, because it did not also deny circumstances alleged in the bill, as evidence of such an agreement. In the Exchequer a plea to a bill for tithes was indeed held good in *Burslem v. Burbidge*, in the 4th vol. of Gwillim's Tithe Cases, 1324;—the plea merely setting forth that the tithes had belonged to a dissolved monastery, and had been granted by divers mesne conveyances from 31 Hen. 8, when they were vested in the crown, downwards till they became vested in the plaintiff. The objection was, that the conveyances should have been set out; but this would not have been necessary in pleading at law, and the plea was abundantly certain, and the defence which it disclosed sufficiently plain and precise.

When it is sometimes said that the rules of pleading in this Court are less strict than at law, and that the pleadings here may be more loose, perhaps such decisions as these may serve to show, that, regard being had to the nature of proceedings in equity, and their great and leading

objects, among others that of securing discovery to the plaintiff, and preventing the defendant from evading the plaintiff's right to wring his conscience, the strictness of our rules is to the full as great on one side of the Hall as on the other.

2. In the present case the bill alleges, among other things, the possession of Jane Hardman and her representatives, as trustees from the death of John Hardman, senior, down to 1815; and the possession of Jane Hardman's representatives is denied by the second plea. But Ellames is averred in the bill to have accounted for the rents and profits to her representatives, and *that*, according to the purport of the authorities I have cited, ought to have been denied, which it is not. The denial of this allegation, that Ellames accounted to Jane Hardman's representatives, is the more material, because that allegation goes to negative the first plea of adverse possession. For either the trusts, on which Jane Hardman and her representatives were in possession, (and Jane's possession at least is not denied at all,) were not fully performed when Ellames accounted to them for the rents and profits, or they were. If they were not, the adverse possession could not have begun; and if they were, then Jane and her representatives were trustees for whoever was entitled to the estate, and consequently for the plaintiff, if the title was in him. According to all the authorities, then, this allegation ought to have been met. Further, the denial of the representatives being in possession, is quite consistent

with the claim made in the bill, to the rents and profits received by the two Jane Hardmans, and not applied by them. There is no averment in the plea that all those rents and profits were applied to the purposes of the trust, and therefore the second plea only goes to restrict the amount of the claim, not to cut it altogether down.

Then neither of the pleas meets the statement touching the documents and writings charged to be in the possession of Ellames, and also charged as proving not only generally the several matters in the bill, but more particularly as showing that the two Jane Hardmans obtained possession of the estate under the term, upon the trusts of that term. It is indeed said that it was unnecessary to deny this allegation as to writings, upon the authority of *M'Gregor v. The East India Company*, 2 Sim. 452, and that his Honor, the Vice-Chancellor, was of an opinion in that case different from his ruling in this. It appears, however, not only that the two cases are reconcilable, but that *M'Gregor v. The East India Company* materially supports the present decision; for his Honor there held, that a plea of the Statute of Limitations needs not deny the possession of documents, when that possession would be immaterial, from there being no allegation that these documents would show any thing which negatived the matter of the plea, that is, a promise within six years. And upon looking to the bill, we find it only alleged, in the usual way when a mere general charge is made as to such writings, that from the documents, the several matters therein-

before-mentioned, or some of them, would appear. But here the averment is specific, that something would appear inconsistent with at least one of the pleas—that of adverse possession since the nephew's death, in 1759; for Jane Hardman, the widow, only died in 1795, according to the statement of the bill. Consequently, it ought clearly, on the authority of *McGregor v. The East India Company*, as well as of *James v. Sadgrove*, 1 Sim. & Stu. 4, and other cases, to have been denied that there were such writings in the possession of the defendant. The case of *Sanders v. King*, 6 Madd. 61, and *Thring v. Edgar*, 2 Sim. & Stu. 274, decided by the Master of the Rolls upon the like principles, do not appear to me in the least inconsistent with the present determination. In the former it was held, that when, beside setting forth his title, the plaintiff alleges circumstances as evidence of that title, a plea negating the title does not protect from answering as to those circumstances, being nearly the doctrine laid down in two of the cases which I have cited before; and in *Thring v. Edgar* it was held, that when the defendant, in the answer accompanying a negative plea, goes beyond denying the facts specially charged as evidence of plaintiff's title, he over-rules his plea. But it is not at all inconsistent with this, to hold, that where facts have been charged inconsistent with the plea itself, negating that negative plea by anticipation as it were, and thus supporting the plaintiff's title, the traversing of those averments, and thereby supporting the plea, is safe, and does

not over-rule the plea. This would be sufficient to show that *Thring v. Edgar* is consistent with the present decision. But the other cases which I have referred to, not only show that so answering does not over-rule the plea; but those cases show, that without such denials the plea itself is bad. Indeed, strictly speaking, the one proposition is involved in the other. Although I have no doubt that the pleas here are well over-ruled, it is difficult to avoid regretting this reiterated litigation upon the property which is the subject of the suit, and which seems fated never to be out of the Court. This decision may keep it here somewhat longer, and in the present stage of the suit it does not become us to conjecture with what final result.

RICKETS v. BODENHAM.

A suit had been instituted in the Consistorial Court of Hereford against Rickets, for non-payment of church rates, and the sentence,—but accompanied with very irregular procedure, to which however he had lost the opportunity of excepting,—had gone against him. This sentence had been confirmed both by the Court of Arches and the Court of Delegates, to which Rickets had successively appealed, he having in like manner omitted before them to avail himself of the objection arising out of such want of regularity, and having suffered the matter to be discussed on the merits. A petition for a Commission of Review was then presented by him.

LORD CHANCELLOR.—The appellant before the High Court of Delegates, having preferred his

Feb. 10, 1834.

Principles that guided the Lord Chancellor in advising the

Crown respecting the issuing of a Commission of Review. Alleged practice of a Consistorial Court, that notice to a party defending personally to attend from Court-day to Court-day is not requisite, cannot be supported.

petition to the King in Council, for a Commission of Review, His Majesty has been graciously pleased to refer the consideration of this petition to the Great Seal, and, according to the constant practice in such cases, the matter has been heard in this Court, for the purpose of better enabling me to tender my humble advice to the Crown, as to the granting or refusing of the appellant's prayer.

Although it is generally said, and is true, that the issuing of such a Commission is not matter of right, but of grace and favour, yet it is equally true that there are certain established principles, which regulate the discretion of granting or rejecting the request. It is certain that a miscarriage below is not of itself a sufficient ground. The miscarriage must have been plain and the error gross, if it be in matter of fact; such error as leaves no reasonable doubt that any other tribunal, or even the same tribunal which fell into it, if the matter were again deliberately brought before it, would see the mistake clearly and set it right. And accordingly former chancellors have explicitly admitted,—Lord Loughborough in *Matthews v. Warner*, 4 Ves. 186, and Lord Eldon in *Eagleton v. Kingston*, 8 Ves. 438,—that though they might feel dissatisfied with the sentence, so far as to be persuaded that they would, sitting in the Court below, have themselves arrived at a different conclusion upon the evidence, yet unless the error committed were undeniable, and as it were glaring, no commission should go; and the same view of the subject was taken by Lord Clare in *Goodwin v. Giesler*, cited in

the note to *Matthews v. Warner*, (4 Ves. 211,) and more recently by Lord Lyndhurst in the much-agitated case of *Dew v. Clarke*, 5 Russ. 163, and by myself in *Ingram v. Wyatt*, where I thought that some part of the evidence in support of the sentence was liable to great observation, insomuch that I exceedingly lamented the want of power over the costs, which fetters the exercise of this anomalous and now expiring jurisdiction.(a) If indeed there be strong reason to think that there has been error in law, the case is different; a Commission then should go; or if doubts have been cast upon legal points of importance, and which it is of high public benefit to have clearly fixed, then too there is ground for the Commission. Lord Eldon recognized this in his report to the crown in the case already referred to, of *Eagleton v. Kingston*; and Lord Loughborough, in *Matthews v. Warner*, granted the Commission chiefly because a paper had been allowed probate which appeared to be like any thing rather than a will; and his lordship deemed it necessary that the subject should be again considered, with a view to some legislative provision being devised, if such a document really were a will by the law, as then administered in the Ecclesiastical Courts. His Lordship probably had in his recollection the case of Mr. Coles's will, in Charles the Second's time, which came before Lord Nottingham on an

(a) The act 2 & 3 Will. 4, c. 92, for transferring the powers of the High Court of Delegates to his Majesty in Council, directed that no Commission of Review should be granted after the 1st February, 1833, except in appeals that might be then pending.

application for a Commission of Review. In the discussion of that case, it is said, the statute of frauds had its origin.

The present case turns little, if at all, upon facts; not at all upon disputed facts; not materially upon alleged error in law, for the appellant does not set forth any proposition by which he can abide, to show that one law exists and another has been applied to his case, even allowing matter of practice to be matter of law, as it strictly speaking is in regulating the procedure of Courts. But without being able to state distinctly that the practice of the Court of Hereford is such as will not authorize the course pursued towards him, he would infer from certain parts of the proceedings that it is so; and because the Courts in London, who reviewed these proceedings, have upheld the practice exercised by the provincial Courts in this case, or because these Metropolitan Courts have decreed against him upon matters belonging to their own practice, he would have the Great Seal advise His Majesty that this point of disputed practice should be sent for a fourth consideration to a new and enlarged commission of delegates. I asked at the argument whether a controversy upon such a question had ever before been made the ground of an application like this; and, as I expected, there was no answer; which I understood to import an admission of the negative. And yet I have put the appellant's case in a much more favourable point of view for his application than the fact warrants, when I have called it a disputed point of prac-

tice. Upon the best consideration I have been able to give the question, the decision below against him has turned, not upon that Hereford rule of practice which he denies, and perhaps justly denies to be fit, or even legal; but upon his own laches, in failing to take the necessary steps for setting aside what had been done to his prejudice; steps which he does not affect to deny the admitted practice of the Courts, whether provincial or metropolitan, required him to pursue. Perhaps it might even be contended that whatever irregularity had been committed was waived by him; but this is unnecessary to support the sentence.

On the 30th September the appellant being personally in Court, and not defending by a proctor, was admonished to attend during the hearing of the cause. This, say the respondents, was sufficient notice of every future proceeding, at any Court, and on any day, as long as the cause should last. It is added, that a distinction is made in the practice of Doctors' Commons, between a party defending in person, and one appearing by proctor; notice from Court-day to Court-day being required in the former case and not in the latter, upon the ground, I presume, of the proctor, as a minister of the Court, being supposed always present. But the learned counsel for the respondents denied, though it struck me that they denied somewhat faintly, that such a distinction in favour of parties appearing personally, and without proctor, was known in the Court of Hereford. I say faintly, for when pressed with

some questions on this head, they would only say they were told so, but that they could not at all answer for the varying practice in the hundreds of provincial Courts. I think it right to observe, that when I look at these proceedings, I am satisfied the practice is not as stated in the Hereford Court. The absurdity of it—the injustice which may be done under it—its repugnance to every thing like reason or principle—may be enough to show that unless a long and uninterrupted series of acts inconsistent with any other rule can be appealed to, or some other equally cogent proof of it can be produced, we ought to regard it as an abuse and not a rule of procedure; an abuse too of no ordinary kind; for it assumes that every suitor of the Court is at each moment of its sitting present, and bound to take notice of the time when it will next sit, and the place at which it may be holden, although its dies fasti are irregular, and its places of meeting are various and distant. Each party is compelled to be present, whether his adversary intends to proceed or no, and that without any notice whatever, unless in the single case where he may be called on to do some acts, when it is not denied that he must be specially admonished before he can be put into contempt. The penalty, however, of having his cause heard and determined in his absence, he may easily incur, according to the statement of the rule, unless he shall be present as constantly in Court as the Judge or the Registrar himself, from the day of his first appearance to the moment of final

sentence. I can hardly imagine any weight of authority from the proper persons to certify the practice admitted to be local, which would be sufficient to make any superior Court hold such a course of proceedings justifiable or legal; and in this case we have no such information at all from registrars or other skilful persons; but, on the contrary, we have pretty strong indications on the face of the proceedings, that the practice here followed is not the regular and right one. For instead of resting upon the general monition of 30th September, 1830, which the respondents say was sufficient, as long as the cause endured, they again and again admonish specially, as on 24th February, 1831, when it is recorded that "the judge admonished the defendant to appear at the Court to be holden at Ludlow, 15th March;" and on that day he again admonished the defendant to attend the next Court at Hereford; and on the 8th October, the cause being concluded in his absence, the defendant is admonished to appear and hear the sentence at the next Court. Moreover, the judge himself is so conscious that there was another and a better practice, that he directs the registrar to make that most singular entry of a note stating his own impression, as he terms it, of the defendant having had a special notice for 19th May, when the witnesses were examined against him in his absence, and a further loose minute of what two proctors believe as to that monition, and what they and the deputy registrar say they recollect of a conversation between the judge and the defendant. Nothing can more clearly show that

the judge and the officers of the Court had as little confidence as possible in the rule of practice upon which they acted ; and when I consider this circumstance, and the acting contrary to the alleged rule, in the absence of all proof of such a rule from those officers who are the depositaries of the practice of the Court, I cannot hesitate in holding it rather to be disproved than proved in the proceedings before us.

Had the matter rested here then, I should probably have held it right to advise His Majesty to grant the Commission as prayed ; although as regards the kind of question mooted, it would have been a case of the first impression. But the decision below does not rest upon any such ground ; and admitting the proceedings to have been ever so irregular, the appellant did not take, at any of the several stages of the cause, the proper and obvious course for obtaining his relief against the irregularity and its consequences. On the 8th October the cause was concluded and assigned for sentence at the next Court. The appellant appeared accordingly at that next Court, on the 17th November, and took two grounds of objection, first, that he had not been duly admonished to appear on the 19th May, (when the witnesses were examined,) and next, that the allegations and facts in the libel were not proved. The first was the objection now in question ; the second was a defence upon the whole merits of the case. To the first the respondents answered that the appellant had the general admonition on 30th September, and they contended, as they now contend, that this

was sufficient. On the second, they went into their case, and the judge pronounced a sentence against the appellant upon the merits, rejecting therefore, or rather disregarding the objection of the want of notice, or, more properly, considering that his defending on the merits, and not taking the proper course to make good his objection upon want of notice, had precluded all discussion of the latter point. This view appears to have been correct; for the cause was then concluded and assigned for sentence by the order of 8th October; therefore the appellant ought to have prayed that the conclusions might be rescinded, and for leave to give in a defensive allegation; and if such prayer had been refused, he should have appealed to the Court of Arches. Instead of taking this course, he went into the merits, and upon the merits a sentence was given. But again, when he brought his appeal, it was against the sentence; and though his affidavit states the judge's refusal to let him into his defence, as well as other matters which one should wish to avoid believing even possible—for example, that the judge would not call upon the respondents, the actors below, to prove the demand and refusal of the rate, because he considered it, on the suggestion of a proctor present, to be a negative, and unnecessary or impossible to be proved—yet we cannot look into that affidavit to contradict the proceedings, on which no refusal to let in the defence appears, nor could appear, inasmuch as no prayer was given in to that effect; to which it may be added, though this is not necessary to be added, that

there is no refusal stated in the libel of appeal. The appellant comes, however, to the Court of Arches, and there, although not by right, yet ex comitate, he might have been allowed to rescind the conclusion, and give in a defensive allegation, had he so prayed. But he does nothing of the kind; he will not avail himself of the indulgence; and again has the case heard upon the merits. Upon the merits the decision again goes against him, and he appeals to the Delegates, where he had yet an opportunity of setting himself right by applying to the bounty of the Court, after having sacrificed his strict right. And here it seems as if, being now surrounded with the most learned advice, and protected by men of skill, men accustomed to a regular practice, he was at length disposed to take the regular course; for his proctor, on the 7th November, 1832, asserted an allegation, and the judge assigned to hear upon its admission the next Court, which was holden on the 23d of that month. The day came, and the Court was holden, but there came no defensive allegation, and for want of it the judges assigned the cause for informations and sentence. It was then heard, as before, chiefly upon the merits, and being decided against Mr. Rickets, by the unanimous opinion of the Court, by all the judges of both Courts, *docti utriusque juris*, he presented his petition for a Commission of Review, and he now confines himself, both in the petition and in his argument at the bar, to the objections which he takes to the procedure, laying aside, for the first time, all question upon the merits.

The several reasons which he urges in his petition are wholly unaffected by the facts, or wholly insufficient to support its prayer. It is not true, as stated in the first reason, that the Court of Delegates refused to receive his defensive allegation; at least the proceedings before us show that he previously asserted such allegation, and that the Court was ready to receive it, but he did not give it in; and if he only means that the allegation was refused in May, 1833, when it was too late after being omitted at the proper time, in the preceding month of November, the averment is wholly inconclusive and immaterial. The second reason, that the Delegates refused to read his affidavit, is insufficient; for that affidavit could not in any regularity be read. As for the complaint of the note inserted by the judge's order on the proceedings, and to which I have already adverted, far from injuring the appellant's case, it would have greatly aided him, had the question turned upon the alleged rule of practice. The receiving of the monition on 11th December, the ground of the third reason, appears to have been quite immaterial; and the rejection of the attestation stated in the fourth and last reason was regular, and had such attestation been admitted, it would only have negatived a service of notice upon which no part of the case, as it now stands, can be said to turn.

Upon the whole matter, I have no doubt that the Court below, in the circumstances in which the appellant placed it by his laches, and by

his conduct of the cause, came to determinations which ought not to be made the subject of further review. If ever a case of this kind was free from doubt it must be one where, independent of the unanimous decision, on a point of practice, of all the judges most familiar with Consistorial proceedings, so many opportunities were rejected of resorting to the indulgence of the Court below, after the appellant's remedy as matter of right was gone; and a case too which, in its present stage, is after all only an appeal to indulgence. I shall therefore tender my humble advice to His Majesty to refuse the desire of this petition.

LOSH *v.* TOWNLEY.

JOHN BALDWIN, by his will, after giving to Elizabeth Cotes an annuity of 109*l.* 4*s.*, a sum of money absolutely, and the house in which she resided for life, devised unto his trustees his real estates, which he directed should be sold, and he bequeathed the proceeds, together with the residue of his personalty, to them, upon trust to pay 100*l.* for the maintenance and education of Elizabeth Baldwin, the daughter of himself and Elizabeth Cotes, and the like sum of 100*l.* for the maintenance and education of Philippa Baldwin, another daughter of himself and Elizabeth Cotes; and upon their attaining thirteen years, such allowance was to be increased to 200*l.* each; and upon their attaining twenty-one years, the same was to be further increased to 300*l.* each, until they should attain twenty-four years, unless they should before that time have become entitled to a moiety of the residue of his estate, or should marry without the consent thereafter required, in either of which cases the yearly payment was to cease. The testator then directed the investment of the surplus income of his residue. The following clauses next occurred in his will:—

" And as to such residue, and the accumulations thereof, I give and bequeath the same in manner following ; that is to say, if the said Elizabeth Baldwin, hereinbefore named, the daughter of the said Elizabeth Cotes, shall attain the age of twenty-four years, and shall not then have been married, or shall marry under the age of twenty-four years with the consent and approbation of my trustees, Alexander Baillie, William Townley, and John Church, and every of them, or in case any of them shall die, of the survivors or survivor of them, then, and in that case, I give and bequeath unto the said Elizabeth Baldwin the interest and proceeds of one equal moiety of such residue, and of the accumulations thereof, immediately upon her attaining the age of twenty-four years, and shall not then have been married, or immediately upon her marriage under that age, with such consent and approbation as aforesaid, but not otherwise, unto her, the said Elizabeth Baldwin, for her life ; and from and immediately after the decease of the said Elizabeth Baldwin, then I give and bequeath one equal moiety of the said residue, and of the accumulations thereof, the whole into two equal parts to be divided, unto and amongst all and every the children of the said Elizabeth Baldwin, &c.

" And if the said Philippa, hereinbefore named, the other daughter of the said Elizabeth Cotes, shall attain the age of twenty-four years, and shall not then have been married, or shall marry under the age of twenty-four years with the consent and approbation of the said Alexander Baillie, William Townley, and John Church, and every of them, or in case any of them shall die, of the survivors or survivor of them, then, and in that case, I give and bequeath unto the said Philippa the interest and proceeds of the other moiety of such residue, and of the accumulations thereof, immediately upon her attaining the age of twenty-four years, and shall not then have been married, or immediately upon her marriage under that age, with such consent and approbation as aforesaid, but not otherwise, unto her, the said Philippa, for her life ; and from and immediately after the decease of the said Philippa, then I give and bequeath the said other moiety of the said residue, and of the accumulations thereof, unto and amongst all and every the children of the said Philippa, if more than one, &c." [Both Elizabeth and Philippa had the usual powers to appoint by deed or will amongst their

children. In default of appointment the children were to take equally their mother's shares; the sons at twenty-one; the daughters at twenty-one, or upon marriage.]

“ And I hereby further direct, that in case either of them, the said Elizabeth Baldwin and Philippa, shall depart this life under the age of twenty-four years, and without having been married with such consent and approbation as aforesaid, then I give and bequeath the said moiety of the said residue, and of the accumulation thereof, so given and bequeathed to her so dying, upon the event hereinbefore mentioned, unto the survivor of them, if she shall live to attain the age of twenty-four years, or shall be married under that age with such consent and approbation as aforesaid, to and for the term of her natural life; and from and after her decease, then I give and bequeath such moiety of the said residue, and of the accumulations thereof, unto and amongst all and every the children of such survivor in such shares, &c.

“ And in case both the said Elizabeth Baldwin and Philippa shall depart this life without having attained the age of twenty-four years, and without having been married with such consent and approbation as aforesaid, and shall die without issue, then I give and bequeath the whole of the said residue, and the accumulations thereof, unto and among my three sisters, namely, Christopheia Clayton, Elizabeth Baldwin, and Sarah Gill, equally to be divided between them share and share alike, &c.

“ And I hereby further declare, that in case they, the said Elizabeth Baldwin and Philippa, or either of them, shall marry without the consent and approbation of them, the said Alexander Baillie, William Townley, and John Church, and every of them, or in the case of the death of any of them, of the survivor or survivors of them, they or she so marrying without such consent and approbation as aforesaid, shall not be entitled to any benefit hereinbefore given and bequeathed to them by this my will, either for them or her support, maintenance, and education, or otherwise; and I hereby in that case revoke all benefit intended for them or either of them by this my will, and in lieu thereof I hereby direct that the weekly sum of one guinea only shall be paid to them or her so marrying without such consent as aforesaid, for and during the terms or term of their or her natural life, such payment to commence payable immediately upon such marriage, and which weekly sum of one guinea I

hereby give and bequeath to them or her so marrying without such consent as aforesaid."

Elizabeth Baldwin attained twenty-four, and died a spinster, having bequeathed her residuary estate to Philippa, who had married Joseph Bent.

A decree of the Master of the Rolls declared that Elizabeth Baldwin having attained twenty-four, Philippa and her issue were not entitled to any interest in the moiety bequeathed and devised for the benefit of Elizabeth and her issue, and that Elizabeth took only a life interest in the said moiety: and it directed certain accounts and inquiries.

Mr. and Mrs. Bent now appealed from so much of the decree as made the preceding declaration.

LORD CHANCELLOR.—Cases of this description are calculated to exercise the subtlety, and bring forth the resources of learned and ingenious men; and the construction of the will now brought before the Court, by appeal from his Honor the Master of the Rolls, has accordingly been ably argued, and with great fulness, on both sides.

To the question which is raised upon it, the clause, containing the gift over upon the death of both daughters, is material, both in so far as it may throw light upon the construction of the preceding clauses, and, as it has been said to give an estate tail by implication to the survivor of the daughters, and thus to vest the absolute interest in the personal fund. In no other

under twenty-four, and without having been married with consent, and shall die without issue, the whole estate to go to the testator's three sisters.

It was held, that in the event that had happened of A. attaining twenty-four, and dying unmarried, there was no disposal by the will of the first moiety.

The doctrine of implication in general considered.

Remark upon the language used by the Courts in construing instruments.

Feb. 10, 1834.

Bequest of a moiety of a residue to A. for life, if she shall attain twenty-four, or marry under twenty-four with consent, remainder to her children. Similar bequest of the other moiety in favour of B. and her children. And in case either of them shall die under twenty-four, and without having been married with consent, the survivor attaining twenty-four or marrying with consent to take the other's moiety for life, remainder to her children. But if both A. and B. shall die

respect is this clause of importance as the question now stands; for we are not called upon to put a construction upon it with the view of ascertaining the amount of interest taken by the plaintiffs (Mr. and Mrs. Losh) in the estate of the testator. Mrs. Losh sues as heir at law and one of the next of kin, and she proceeds upon the ground of intestacy, and is met by the construction put upon the will, which would give the defendant, Philippa Bent, the testator's surviving daughter, the whole of her sister's moiety, either as legatee under her sister Elizabeth's will, or as survivor under the clause in her father's will containing the gift over as between the daughters, or impliedly, by way of remainder in tail, expectant upon the determination of her sister's life interest. If both those constructions fail, and if Elizabeth only took a life interest in her moiety, Philippa is disentitled in any way; that is, the moiety is the undisposed residue of the testator, and the plaintiff, Mrs. Losh as heir, or one of the next of kin, is entitled, in some way, to some amount. The decree partially appealed from goes no further, but directs an inquiry who are the other next of kin besides Mrs. Losh. To this part of the decree there is no objection made; and if his Honor's view of the subject be in other respects correct, and his judgment be affirmed, the appeal being dismissed, the inquiry directed will take its course, and the further questions that may arise will be disposed of upon further directions, after the result of the inquiry shall have been reported by the Master.

I am of opinion that his Honor has come to a right conclusion in construing this will; and although I see considerable difficulty in construing some parts of it, especially the clause containing the gift over to the testator's sisters,—to which I am really unable to assign a rational or consistent sense, if the words stand exactly as they now do, but equally unable, upon any view that is taken of the other parts—yet we are not pressed by that difficulty in the present question; and I feel no serious doubt as to the construction which should be put upon the whole will, as far as the question before me goes. It appears clear, first, that no estate tail can be raised by implication, upon the clause in which is the gift over to the testator's three sisters; and, secondly, that there is no gift to the surviving daughter under the other clause, in the event which has happened, of Elizabeth living to twenty-four, and dying unmarried.

1. The doctrine of implication, which has sometimes been inaccurately said to rest upon the furtherance of the general intent, in truth stands mainly upon the necessary construction of the particular provisions in the instrument; although where other provisions are contrary to the implication, they of course exclude it, and so far the general intent may be said to be let into the consideration of the question. It would be more strictly correct, therefore, to say, that the law raises estates by implication, where the words most literally taken would not express, or would not sufficiently express, the plain meaning of the writer; and where, in order to bring out that

meaning, something must be understood beyond or even different from what is set down ; but that no such adjustment or correction of the literal meaning can be permitted, where it is contrary to the plain meaning of the other parts of the instrument. Nor is this rule peculiar to the law ; it is the ordinary course of interpretation, which men follow in other things and in their ordinary affairs, only limited by certain distinctions, some of them, perhaps, bordering on refinement, though naturally enough arising out of that classification of cases in which every science consists, and which is necessary to the establishment of general rules. When a gift is to John, after the death of Thomas, and John, but for the gift, would have taken immediately, it is plain, that to make sense of the words, and to avoid the supposition that the giver had no meaning at all, we must supply a gift to Thomas during his life, on the determination of which John is to take ; and so a gift to John for life, and if he die without heirs of his body, then to Thomas, gives, taken altogether, an estate tail to John ; because, if John took only an estate for life, a most material part of the sentence would have no meaning, and because the gift over is postponed, not to John's death, but to the failure of heirs of his body. In construing the words themselves, it is further obvious, that to make their sense tally with the rest of the instrument, we are entitled, where there is any ambiguity, to clear it up by reference to that residue, and even to supply or modify as may be necessary, in order to prevent the literal

construction of the particular portion from defeating the plain intent of the whole. Hence, such cases as *Robinson v. Robinson*, 2 Ves. sen. 225; 1 Burr. 38, where the words "no longer," were rejected; *Doe v. Applin*, 4 Term R. 82, where "and amongst" were disregarded, and which Mr. Justice Buller thought, therefore, went too far—and various other cases, which have all proceeded upon what Lord Kenyon called "looking at every thing within the four corners of the instrument," and taking the whole together, to aid in construing each part; or upon what Lord Ch. J. Wilmot, in *Roe v. Grew*, 2 Wils. 322, called a balancing of opposite intentions, and letting the weightier of the two prevail.

But there is nothing more clear than that this principle, instead of authorizing the implication resorted to in the present case, and from which an estate tail, and so an absolute chattel interest, is sought to be raised, altogether excludes it. It might, indeed, be enough to remark, that no instance whatever can be produced of an estate tail being implied from words so connected, not merely with a preceding estate, but with a determination of that estate under a certain age, and without a marriage contracted according to a certain prescribed course. But look at the consequences of the implication which is attempted from the words of the clause under consideration: Two consequences are inevitable, and either is fatal. First, the word "and" must be read "or," and therefore the estate tail must be raised quite independent of the preceding part of the clause, and without the

least regard to the events carefully but exclusively enumerated therein; so that the daughters will take such estate tail at all events, whether they die under twenty-four or over, and whether they marry or not; and whether, marrying, they do so with or without the consent prescribed; and thus the pains which had been taken to specify one of these events, and one only, a dying under twenty-four, unmarried with consent, have been entirely thrown away; although the reluctance of Courts to reject words without necessity is plain from all the cases, of which *Doe v. Cooke*, 7 East, 269, and *Doe v. Rawding*, 2 Barn. & Ald. 441, may, among many others, be referred to. Next, at all events the estate tail being given, and the interest being chattel, the absolute interest is vested in the daughters, without the least regard to their marrying, with or without consent, and to the utter destruction of the interests so carefully provided for their children in the first clause. So that two prevailing objects having been in the testator's view—to provide for his grand-children, by giving them the corpus, while he gave the life-interest only to his daughters; and to secure these daughters against improvident matches, by prohibiting their marrying without consent, until they should reach twenty-four,—the implication upon the clause giving the residue over to the sisters, is recommended to us by its inevitable effect of defeating both these objects, as completely as if the whole will had been cancelled, and another put in its place of a few lines, giving the absolute interest to the daughters, marrying how they might,

and regardless of any children they might ever have. (a)

(a) The Master of the Rolls was once disposed to adopt the construction here combated, as appears by the following "Heads of Judgment" prepared in his Honor's handwriting, and delivered out to the parties the first time the matter came before him.

"In the first expression of the will as to the two daughters, they take each maintenance until they attain twenty-four, or marry before that age with consent; attaining twenty-four, or marrying before that age with consent, they take a life interest with remainder to their children.

"If either daughter die before twenty-four or marriage with consent under that age, then the moiety intended for that daughter is to go to the surviving daughter at twenty-four or previous marriage with consent for her life, with remainder to her children in the same manner as her original share.

"It is highly probable that, as the testator gives to the surviving daughter the share intended for the deceased daughter, in the event of its never vesting in her for life, that he would, if it had occurred to him, have given the share of a deceased daughter to the surviving daughter, when it had once vested in the deceased daughter for life, but had afterwards failed for want of children. But it is not that sort of necessary inference which can supply the want of a direct gift.

"In the subsequent clause, in case both daughters die under twenty-four, and without being previously married with consent, and without issue, he gives the whole property over to his sisters.

"By this clause the whole property is given over to the sisters, only in the event of both daughters dying without having acquired a life interest, and without issue. This imports that if the daughters died without having acquired a vested interest, still the property was not to go over if such daughter left a child. A daughter might leave a child, although she did not acquire a vested interest, because she might marry under twenty-four without consent.

"This event is not before referred to,—and what, if such had been the event, must have been the construction of the will?

2. There being then no ground whatever for holding that the clause we have just reviewed gives an absolute interest, as being sufficient to raise an estate tail, were realty the subject of its disposition:—can the case of the appellant be aided by the other clauses? It is said, the first clauses in the will, giving the corpus to the children of the daughters, and providing against their marriage without consent, are ambiguous, 'inasmuch as the earlier portion of them, respecting unauthorized marriages, may only apply to the daughters, and not to their children; and that the clause containing the gift over upon the deaths of both daughters removes this ambiguity, and shows that the children must take, whether the daughters marry with or without consent. This is the first step in the argument; the next is, that having thus got a clear interest in the children of the daughters, we are bound to alter the clause, which gives the corpus over from one

"No interest is in terms given to any grandchild, unless where the parent acquires a vested interest for life;—could the other daughter attaining twenty-four, or marrying previously with consent, take against the child of such a deceased daughter for her life, with remainder to her own children, by any necessary inference, and does not, upon the whole, the case come to this? A gift of a moiety to Elizabeth for life, at twenty-four, with remainder to her children, and if she die without children, then over. And is it not to be argued that such a gift would be a quasi estate tail in Elizabeth, and that her moiety now belongs to those who claim under her will, if she died testate, and to the crown, if she died intestate? and are the proper parties to this argument before the Court?

"In this view of the case, '*and without issue*' must be read '*or without issue.*'"

daughter to the other, by inserting the words "or without issue." Now it appears to me very clear that the appellants are not entitled to take either of these steps, upon the sound construction of this instrument; nay, that its obvious meaning stands opposed to both.

We are now to look therefore at the rest of the will, and see whether or not each daughter took an interest beyond a life estate, so as to let in the bequest in Elizabeth's will; and whether or not there is a survivorship established in the event which has happened, so as to entitle Philippa upon her sister's death. The testator first gives yearly sums for the maintenance of the daughters, increasing as they grow older, to 300*l.* a-year when they are twenty-one, and until twenty-four; such allowance to cease either if they shall become entitled to the interest of the residue by marrying with consent of three persons named, or if they shall forfeit by marrying without that consent; and in the latter case, whichever so marries is to have only a guinea a week, and to lose all other benefit whatever under the will. Upon attaining the age of twenty-four, or marrying with consent, each is to have a moiety of the income of the residue, which the testator directs to be converted into money. And from and after the decease of each, the moiety of the corpus is to go among her children in shares, according as she shall by deed or will appoint, and in such manner as she shall direct, and under such conditions and restrictions as she shall impose; and in default of appointment, equally. Now

the argument urged against the judgment is mainly bottomed upon the position that the children of the daughters, though born of a marriage contracted without consent, take as if there had been the consent; and if this could be made out, it would undoubtedly go far to establish the construction which the appellants give, to what they call the clause of survivorship, but which is rather one of forfeiture, and which the respondents treat as if the appellants must take it as a clause of cross remainder. In this view of the matter, however, I cannot concur; it seems repugnant to the manifest intention of the testator, and inconsistent with the whole frame of the will. The daughters are stated to be illegitimate in the will, and they and their mother are treated as such. It is plain that the testator regards the mother as in an inferior station, by giving her little else than an annuity of 109*l.* 4*s.* a-year, while he makes such ample provision for the children; and he appears to labour under the apprehension of their forming low connections by marriage, in which event they are reduced to a bare subsistence. Nothing can be more inconsistent with this precaution than to allow them, after making such a match, to distribute the corpus among the issue of it, leaving, moreover, all its accumulations during their life undisposed of, unless we read the first clause as describing accumulations after the daughters forfeit, whereas it seems rather to describe the accumulations before they enjoy the whole income; for, according to this construction, the income of the moiety belonging to either so marrying, is un-

applied during her life, all but fifty-two guineas a-year, and she is nevertheless to appoint it all to her children, who are to enjoy it after her death, and to start suddenly into affluence, after starving during her life ; no other provision whatever being made for them, except their shares of the corpus in reversion. It is true that cases and events are left unprovided for, as always happens in such wills, and some inconsistencies there are in its provisions, construe it how we may ; but no inconsistency so revolting as this, and no omission of so plain and obvious a consideration. Again: The argument for the appellants takes this shape. There is a gift to the children of the daughters, and therefore you must insert these words, "or without issue," in the clause which has been perhaps loosely called that of cross-remainder. — I say loosely, because the appellants do not necessarily rely on a cross-remainder. To such an insertion there are many objections. It is against the plain meaning of the clause as it stands, and requires all that goes before to be rejected as nugatory. So far, therefore, it is exposed to the same objection to which the reading "and" as "or," in the clause we first discussed was found liable. Next, it may be said to be against the meaning of the other clauses which exclude the issue of the unauthorized marriages ; but, independent of that, and supposing such issue not to be excluded, inserting "or without issue," would give the absolute interest to the daughters, whether marrying with or without consent, and thus disappoint their issue altogether.

And lastly, it is not only unauthorized by any of the cases which have been cited, but may be accurately said to be opposed by their whole spirit.

Spalding v. Spalding, Cro. Car. 185, was a case free from all doubt; there was no other way of reading the devise so as to make it consistent with itself, or even sensible, than to supply the words "without issue." The eldest son took an estate tail, by certain express words, and if the literal meaning of the other words in the same sentence had been alone regarded, that estate tail was in the same breath cut down to an estate for life, and these words, "the heirs of his body," were struck out of the will. But no one could doubt, that when the testator said "if John dies, living Alice," he meant to say, if the estate tail which he had given John was defeated; and though this would have been enough without looking out of the clause, the other parts of the will were found to aid the same construction, and instead of being, as here, wholly repugnant to it, they were justly held to show what was "the weightier intention," as Lord Chief Justice Wilmot calls it, supposing there had been a balance to strike between the particular and general intents, which there was not. No cases can be less alike than that and this. In *Doe v. Hicks*, 7 Term R. 433, where the question was, whether the legal estate was outstanding in trustees, or was in the lessor of the plaintiff; the ground for maintaining the affirmative was the limitation in a will to trustees and their heirs, to preserve contingent remainders. The Court decided

in the negative, by holding, that the estate limited to the trustees was only to enure during the lives of the tenants for life, in order to protect the remainders limited upon the determination of the life estates; and the will was read as if such words had been inserted, plainly, because such was the intent to be gathered, as Lord Kenyon said, from looking at the whole will. Any other way of reading it, we may observe, would have been in direct repugnance to it, and especially to the devises over, which were upon the decease of the successive tenants for life. *Doe v. Micklem*, 6 East, 486, was a devise by the testator of Blackacre to his sister Imber, for her life, or if she should outlive his wife and sister Heath, so as to come into possession of Whiteacre, (devised by another part of the will,) then to his friend Mary Martha for life, remainder to G. Leach (lessor of the plaintiff) in fee; and it was held, that G. Leach took a vested remainder, by supplying the words "and after her death," so as to read it, "to Imber for life, and after her death, or if she should outlive Heath;" there being clearly no other way of making the devise sensible, no other alternative to serve the purpose of the word "or," and no other way of giving effect to the plain intention of the testator; the whole context showing, and the words themselves proving, that he contemplated some alternative, and that the alternative described by the words inserted was the one in his contemplation. The insertion, Lord Ellenborough said, supplied a necessary alternative, and the only alternative. *Doe v. Turner*, 2 Dowl.

& Ryl. 398, has been sometimes thought to go further than the former cases, and so thought one of the judges, who decided it; but there seems no room to doubt of the decision, or to consider it as proceeding more upon conjectural grounds than the other cases. The devise was first to A., of half a garden and so much stock (a specific legacy), and then came these words, "I give further my yard, stable, &c., B. to have the interest and profits during her life," and the Court read this as if it had been, "I further give him (A.) my yard, &c., B. to have the interest and profits during her life," thus giving A. the fee, and excluding the heir-at-law, by inserting "him." But no one could doubt that this was the meaning of the testator, and the Court relied upon the use of the word "further," instead of "item," which had previously been used to introduce the first gift to A.; and on the impossibility of giving any sense to the material words "I further give," unless it was supposed that the accusative pronoun had been dropped by mistake. In all these cases then,—and the others are to the like effect,—the words supplied or rejected, or the transposition made, are such as the obvious sense of the passage demands, or the context requires, or the furthering of the general intention makes necessary, and never in any one instance, such as either may be repugnant to the general intent, or introduce inconsistency into the clause itself, or create a variance with the context.

A language in construing instruments has long been used, partly for the convenience of its con-

ciseness, which, however, has a tendency to mislead, and we speak familiarly of reading "and," "or,"—of rejecting words, as "for life," or "no longer,"—of inverting the order of words, and of inserting words, till we almost seem to be altering the instruments we are called upon to interpret; and sometimes we are apt to use the device which these expressions denote, rather because there exists such a phrase, than because we are entitled to use the thing. In truth, all these forms of expression mean but one thing, though framed with variety of diction. It is, that the meaning of the maker of the instrument is inaccurately expressed, either from being obscurely, or elliptically, or contradictorily enunciated; and that having, upon a view of the whole matter, ascertained his real, or full, or prevailing sense—real, where it is given ambiguously—full, where elliptically—and prevailing, where contradictorily—we give to the whole such effect as the result of that inquiry authorizes, for accomplishing his purpose.

In construing the will before us, there is nothing to justify the imposing upon it such a meaning as the appellants contend for, and the judgment of his Honor the Master of the Rolls must therefore be affirmed. It is a case in which the estate ought to bear the costs of the appeal, as well as in the Court below.

HANCOCK v. TEAGUE.

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THIS was a suit for the specific performance of an agreement by Teague to sell certain mines to Hancock, who had subsequently to the contract become a bankrupt, but had obtained from Tilson, his assignee, a reconveyance of his original interest. A question arose as to the parcels comprised in such agreement and reconveyance, and Tilson having been made a defendant, and having disclaimed and being present at the hearing before the Master of the Rolls, was permitted, upon this matter, to give an explanation, which was stated in the decree as an admission. The depositions of witnesses had also been taken. An appeal was now brought from his Honor's decision, which was in Hancock's favour.

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Feb. 12, 1834.

LORD CHANCELLOR.—The plaintiff having been made a bankrupt, sues here under an assignment executed to him in 1828, by the assignee under his commission; and a question having arisen, whether that assignment comprised the interest upon which the whole claim turns, namely, the mine, or shares in the mine, called Wheal Montague—which the plaintiff contends he took under an agreement of February 1817—and it being found that the deed of assignment itself only purports to assign to him Wheal Harmony, the Court below did not order any preliminary inquiry into the parcels of the property operated upon by the assignment of 1828; nor did it proceed to adjudicate by any construction upon the effect of the assignment, so as to find that it passed the interest in Wheal Montague; but it allowed Mr. Tilson, the assignee, who was

present at the hearing, to state ore tenus what he meant to pass when he used the words "Wheal Harmony" in the assignment. Mr. Tilson stated, that he meant or intended thereby to convey all the interest which the plaintiff Hancock had derived under the agreement of February 1817 with the defendant Teague, and which had passed to his assignee by the bargain and sale. The ordering part of the decree records this parol statement. Mr. Tilson had been made a defendant to the suit, as assignee under the commission, and disclaimed all title and interest. Therefore, what he states is in the decree termed an "admission;" and I presume it is thought that this form of expression, by making his statement, as it were, the judicial act of a party to the suit, gives this somewhat singular proceeding a kind of authority, and clothes it with an appearance of regularity which might not otherwise belong to it. But I am unable to understand how the person who has taken a conveyance can obtain permission to put his own and his vendor's construction upon the instrument, by making that vendor a nominal defendant to a suit substantially brought against a third party; or how the meaning which such vendor may have had when he conveyed, can be taken from his own assertion, the more because he is a nominal party to the suit. That assertion is no more to be called an admission than the plaintiff's own assertion, who is distinctly in the same interest with him, and indeed stands in his shoes; so that his being a party goes for nothing in this question, and what he says can be

no more regarded than if he were a stranger to the cause. If it be said that the interest was either in the assignee under the commission, or in the bankrupt, then the answer is obvious—the disclaimer would have been sufficient—upon which the Court, however, did not think proper to rest. If, again, it should be urged that the bankrupt's title was good as against all but his assignee, and that this statement showed his assignee did not dispute his title, the same answer may be given. But, in the view which I take of this part of the case, it is unnecessary to ask how the interest vested in the plaintiff affects the question, or to inquire how far the plaintiff's title under the assignment is material to the question mainly before the Court; for there is enough to show that the decree cannot stand in its present form, even if we should be of opinion that the statement in the introductory part was material. Were it to stand, a record would remain in existence, setting forth that a deed had been explained by the "admission," that is, by the parol averment of the party who made it; that a vendor had been allowed to state that, in using certain words in a conveyance, he intended a certain thing; that he had the meaning contended for by his vendee, the plaintiff in the suit. So far, therefore, the decree must needs be altered, as to strike out this statement.

After reflecting upon the evidence in the cause, I am satisfied that there must be a further inquiry. I therefore abstain (as I always do in such circumstances) from going into the particulars, or from expressing which way my opinion

leans upon the evidence as it now stands, further than to say, that I have not been able to feel the force of the consideration upon which his Honor the Master of the Rolls appears to have rested so much—that Wheal Harmony did not exist before August 1817, whereas it seems only to have been the name that was then new, or rather unknown. The testimony, too, of R. Chadwick, which is very material, ought, I think, in the situation in which he stands, to be further sifted; although, certainly, I am anxious to observe that nothing to discredit him appears upon the face of it, as we have it in the depositions; on the contrary, he answers freely as well where the fact makes against the weight of his evidence, as where it helps the plaintiff's case. Further—the contradictions to the defendant's statements in his answer, by documents produced or otherwise, are fit to be considered; and, as we have only the oath of one party here, it will be expedient that both should now be examined. I shall therefore direct an issue of Parcel or No Parcel, to be tried in respect of the contract of 1817; and as such trial is to be had, it may be as well that there should be a second issue touching the subsequent assignment to the plaintiff. The two issues, therefore, will be framed to try, 1st, what was agreed to be conveyed in February 1817, by the defendant to the plaintiff; and, 2nd, what was assigned to the plaintiff by the assignee under his commission in 1828. But it is to be understood that I by no means intend to pronounce any opinion even as to the materiality of this second point, and should probably not have

thought it worth while to direct any inquiry at all respecting it, certainly not to send it beyond the Master's office, had the main question appeared to be sufficiently clear.



ATTORNEY-GENERAL *v.* ST. JOHN'S COLLEGE,
CAMBRIDGE.



THE judgment embodies the whole of the Information except the notice of February 1831, which was as under.

"To the very Reverend the Master and the Fellows of Saint John's College, Cambridge: We the undersigned inhabitants of Pocklington cannot forbear expressing how greatly aggrieved we consider ourselves by the very small allowance made to the scholars lately sent to St. John's from our Free Grammar School, at which we also have sons in a course of education. We feel ourselves aggrieved because the munificent Dr. Dowman not only intended that our sons should have a classical education at school, but also that they might afterwards be encouraged and enabled to prosecute their studies at the University, and with that intent invested the master and fellows of St. John's College with divers estates, the present rental of which exceeds 600*l.* per annum, for the maintenance of five scholars from hence during their residence at College. We deem it therefore our duty to call your attention to the very small proportion your allowance bears to the expense of maintaining a student even upon the most economical scale possible, and to appeal to your equity and justice, and inquire whether the spirit or even the letter of the Founder's endowment is carried into effect by so small an allowance."

The ensuing is a copy of the endowment as pleaded.

"Omnibus Xpi fidelibus ad quos presens scriptum quadripartitum indentatum pervenerit Johannes Dowman utriusq; juris Doctor ac Archidiaconus Suff Salutem in Domino sempiternam Cum ex jure divino unusquisq;

Cristianus orthodoxe fidei id opus teneatur exercere pietatis quo magis in hoc mundo sibi accumularet meritum et premium in futurum Sciatis igitur q̄ ego prefatus Johannes Dowman Eboř Diocesis in honore omnipotentis Dei et gloriosissime Virginis Marie matris ejus omniumq̄ sanctorum ad sacrosancte matris ecclesie exaltationem èt augmentum cleri in Universitate Cantabrigie Necnon ad salutem animi mei dedi concessi et hac presenti carta mea quadripartite indentata confirmavi Magistro ac Sociis et Scolaribus Collegii Sancti Johannis Evangeliste in Universitate Cantabrigie vulgariter nuncupati Seynt Johns College omnia terras et tenementa mea redditus reversiones et servitia mea cum suis pertineñ situañ et jacentia infra villas et parochias de Kenythorp Bellithorp Langton Bordesall et Lenyng super Yorke Wolde in Coñ Eboř Necnon omnia terras et tenementa mea redditus reversiones et servitia cum pertineñ situañ et jacentia infra villam et parochiam de Staveley in Coñ Derby ac omnia terras et tenementa mea prata pascua et pasturas boscos aquas ac coñas pasture cum pertinenciis nuper in tenura Jacobi Maden Milonis Northe Nicholai Walshe Thome Lynthwit Otwelli Coterle Johanne Turner vidue Christopher Stansall Rogeri Firthe et Nicholai Miller Paynter in Staveley predicta Ac etiam omnia terras et tenementa mea in parochia de Walles et Walleswode in Coñ Derby nuper in tenura Nicholai Frechwell ac etiam unum messuagium et omnia terras et tenementa mea prata pascuas pasturas et boscos cum suis pertinenciis in parochia de Hamesworth in predict̄ Coñ Eboř nuper in tenura Wiffmi Chapman Quequidem terre et tenementa et cetera premissa cum suis pertinenciis extendunt se ad annum valorem quindecim librarum ultra reprisas et que in presenti dimituntur certis personis annuatim ad firmam secundum ratam ejusdem valoris Et quequidem terras et tenementa Ego prefatus Johannes Dowman nuper habui et perquisivi michi prefato Johanni Dowman et heredibus meis prout per separales cartas michi inde confectas plenius continetur Habend̄ et tenend̄ omnia predicta terras et tenementa et cetera premissa cum pertinenciis predictis Magistro ac Sociis et Scolaribus Collegii predicti et successoribus suis imperpetuum ad certos usus et intentiones sequentes decla-

rañ et inferius specificañ Ac etiam sciatis me prefatum Johannem Dowman assignasse fecisse locoq, meo per presentes posuisse et constituisse dilectos michi in Christo Robertum Nevell generosum Georgium Williamson et Thomam Colson meos veros et legitimos attornatos conjunctim et divisim ad intrandum pro me et nomine meo in omnia predicti terras et tenementa et cetera premissa cum suis pertinenciis ac quascunque personas inde totaliter expellend et amovendum Necnon deinde ad deliberandum pro me et noie meo pfañ Magistro ac Sociis et Scholaribus predictis aut eorum in hac parte certo attornato plenam et pacificam possessionem de et in omnibus predictis terris et tenementis ac ceteris premissis cum pertinentiis suis secundum vim formam tenorem et effectum hujus presentis mei scripti quadripartite indentañ eis inde confecti ad eam intentionem et effectum q ipsi et hujusmodi successores sui certa onera juxta meas ordinationes et dispositiones inferius limitand et declarand faciant et imperpetuum observent prout sequitur In primis volo et ordino ac firmiter statuo per presentes q predicti Magister ac Socii et Scholares inter cetera statuta que per executores egregie principisse Margarete nuper Comitisse Richmondie et Derby fundatricis hujus Collegii ordinata sunt incorporari faciant statuta et ordinationes quasdam pro quinq, discipulis mei Johannis Dowman antedicti in eodem Collegio perpetuis futuris temporibus sustentand ultra et preter supramemoratos discipulos pro fundatrice antedicta et pro aliis benefactoribus institutos aut imposterum instituendos Eruntq, hii quinque discipuli et eorum quilibet per me assignati et nominati ad Collegium predictum de quocunq, voluero Coñ durante vita mea naturali dummodo fuerint moribus et doctrina habiles et idonei Et postq^a Deo disponente ab hoc mundo migravero Volo et constituo q quotienscunq, [locus] alicujus dictorum quinq, discipulorū vañre contigerit per mortem cessionem resignationem privationem seu expulsionem aut quocunque alio modo scđm ordinationes et statuta fundatricis predictae tunc assignatio presentatio et nominatio dictorum quinq, discipulorum et eorum cujuslibet perpetuis futuris temporibus duraturis assignandorum presentandorum [et] nominandorum [ad Magistrum Gardianos et Fratres Fraternitatis] sive Gilde nominis Jesu beate Virginis .

Marie et Sancti Nicholai in ecclesia parochiali de Pok-lyngton in Coñ Eboř per me prefatū Johannem Dowman nuper erecte et fundate et ad successores eorum imperpetuum pertineat Et si contingat Magistř Gardianos et Fratres pro tempore existentes non concordare nec concordare poterint infra duas septimanas post noticiam eis factam per Magistrū et Socios ac Scholares Collegii predicti qui pro tempore fuerint Tunc volo et ordino q̄ ille seu illi pro discipulo seu discipulis nominetur seu nominentur et eligatur seu eligantur quem seu quos Dñs Decanus metropolitane ecclesie Eboř et successores sui qui pro tempore fuerint consenserint si presens sit in civitate Eboř vel infra spacium viginti miliarium civitatis Et si ip̄e Dominus Decanus ad tunc nō sit presens infra spacium viginti miliarū predicti Tunc volo et concedo q̄ ille scholaris vel discipulus seu discipuli nominetur seu nominentur in quem seu quos Dominus Cancellarius Ecclesie Eboř predictae consentiat Et volo et ordino q̄ hii quinq; discipuli acceptentur eligantur et recipiantur et eorum quilibet acceptetur eligatur et recipiatur ad idem Collegium ab eodem Magistro ac Sociis et Scolaribus Collegii predicti juxta formam modum et tempus que pro annua electione discipulorum fundatricis in statutis ejusdem Collegii ordinantur Ac volo et ordino q̄ hii quinq; discipuli et eorum quilibet sic electi accepti sive admissi in eodem Collegio habebunt paria emolumenta commoditates et avantagia cum paribus libertatibus et commoditatibus in omnibus et per omnia qualia et quemadmodum ceteri discipuli ejusdem in futurū electi seu eligendi admissi sive admittendi in Collegio predicto habent et in futurū habebunt quia redditus et possessiones ac alia tenementa eis et successoribus suis per me data et collata eidem Collegio et ab eodem recepta hoc idem merentur et ad illud ip̄m sufficiunt et cum eisdem tenementis ac ceteris premissis dicti Magister Socii et Scholares et eorum consiliarii bene contentati et placati existunt Ac etiam volo et ordino q̄ hii quinq; discipuli infra Coñ Eboř sint oriundi et eorum [quilibet] sit oriundus et precipue assumantur et eligantur illi discipuli qui ex cognatione et cognomine meo sint de quacunq; patria seu ubicunq; si tales ad hoc sufficientes reperiri poterint Alioquin volo et ordino ego prefatus Johannes Dowman q̄ tales discipuli semper eligantur qui

de scola mea grammaticali de Poklyngton eruditi et educati fuerint de quacunq; patria nascantur maxime tamen si qui ibi nati fuerint ubi terre et possessiones predictæ jacent et ad hoc habiliores sint et prestantiores aliis nec tamen alibi q^a de scola mea predicta modis et formis suprascriptis assumantur et nisi de simpliciter optimis grammaticis illius scole et de illis qui sunt magis egregii et moribus ornatiores Proviso semper q; habent qualitates conformes ac mores et doctrinam secundum statuta ejusdem Collegii pro discipulis fundatricis ordinata Et statim ut electi et admissi fuerint in dicto Collegio tactis sacrosanctis Dei Evangeliiis tale et simile prestabunt juramentum et sicuti ceteri fundatricis discipuli pro tempore existenti prestabunt et prestiterunt quibus juxta statutorum exigenç in omnibus se conformes exhibebunt In hiis quatuor tamen discrepantes Primo volo quod dicantur se esse [et] dici Scholares Magistri Johannis Dowman utriusq; juris Doctoris Archidiaconi Suff Secundo q; tempore missarum q^adiu sacerdotes non fuerint quolibet die psalmum de profundis devote et distincte dicant pro anima Magistri Johannis Dowman utriusque Juris Doctoris cum autem in sacerdotium erecti fuerint collectum specialem in missis suis pro anima ejusdem Magistri Johannis Dowman supradicti parentum amicorum et benefactorum suorum dicant Et tercio q; in sermonibus suis cum verbum Dei seminaverint peculiarem et specialem publice faciant recommendationem pro anima dicti Magistri Johannis Dowman parentum amicorum et benefactorum suorum Quarto volo et ordino q; Magister ac Socii et Scholares predicti Collegii premonitionem faciant Magistro et Gardianis predictæ Gilde dictæ ville infra sex ebdomadas cujuslibet vacationis cujuscunq; discipuli mee foundationis in eodem Collegio Et preterea si vacatio fuerit die octavo ante tempus electionis In hoc casu volo q; illi Magister ac Socii et Scholares premoneant Magistrum et Gardianos predictæ Gilde per sex ebdomadas vel quatuor ad minus ante festum oim sanctorum proximum sequenti de illa vacatione ut poterint predicti electores nominare alium vel alios Ad quorum oim observationem jurabunt hii quinque discipuli antedicti et quilibet eorum cum juramentum in sua admissione prestiterint Ac etiam statuo et ordino q; Magister ac Socii et Scholares dicti Collegii et eorum successores imper-

petuum jurent et jurentur ad firmam et inviolabilem observationem oīm et singulorum in presenti scripto quadripartito contentorum undiq; ex parte ipsoꝝ in sua prima admissione sicuti ad cetera statuta in genere specie et mediis eorum juramentis solempniter et in specie promittant et q̄ oīa et singula in isto scripto eodem contenta ad unguem quantum possunt observabunt et observari procurabunt Quia vero Didascoli seu scole predictę Magistri nisi bonis moribus et virtutibus munita sola non sufficiat nec istorum qualitas per dictū Magistrum et Gardianos et Fratres fraternitatis sive Gilde predictę plene aut ad unguem minime discuti valeat Volo et ordino ac firmiter [statuo] ut quicumq; de Collegio predicto Magister aut Socius per Magistrum ejusdem Collegii missus dictam villam de Poklyngton appropinquare contigerit eandem villam adeat dictam scolam meam ibm intret Magistrum ejusdem scole salutet aut absentem ad scolam venire faciat diligenterq; examinet quem si moribus aut scientia culpabilem haud minus idoneum reperierit infra terminum amoveri faciat aliumq; eo peritiorem aut moribus ornatorem per dictum Magistrum ac Gardianos dictę Gilde eligi ordinari et institui cum omni celeritate perspiciat tam in sui Collegii utilitatem et decorem q̄ in hujus mee voluntatis firmitatem et vigorem ut qui sua incuria aut negligentia id minus fieri animadverterint si scholares ibidem ad suum Collegium haud [multos aut] nullos idoneos reperierint non tam mee ordinationis defectui q̄ sibiipsis sueque inadvertentie commissum istud dari existiment quo fit ut et hic adjiciendū inserendumq; decreverim quod et in Gilde scoleq; mee statutis ordinavi unumquemq; scilicet predictę scole Mg̃rm officio ibidem per mortem naturalem aut civilem resignationem cessionem amotionem aut aliū modum quemcunque vacante cum maturo predic̃ Magistri Collegii et Sociorum consilio per dictū Mg̃rm Gardianos et Fratres ejusdem fraternitatis sive Gilde eligendū instituendū et confirmandū et similiter ut predictum est si amovendus fuerit Mg̃ri et Sociorum Collegii predicti consilio amovendum Et volo preterea q̄ si defectus fiat per prefatos Magistrum Socios et Scholares dicti Collegii aut per eorum successores in non admittendo vel non bene gubernando tractando sive sustentando dictos discipulos sive scholares meos ex dicta scola mea de Pok-

lyngton sibi presentatos modo et forma in presenti mea ordinatione superius declarā et limitatos Ex tunc volo et ordino q totus titulus status et possessio quas prefati Magister Socii et Scholares dicti Collegii Sancti Johannis Evangeliste et successores sui tunc habent et possident in predictis terris et tenementis redditibus reversionibus et serviciis cum suis pertinentiis per me superius eis dañ omnino sint vacue et cessent Et ex tunc volo ego prefatus Johannes Dowman q predicta oīa terre et tenementa redditus reversiones et servitia cum pertinentiis in presenti scripto meo quadripartito superius ut premittitur nominā et limitañ integre remaneant Magistro sive Custodi et Scholaribus Collegii Christi in Universitate Cantabrigie situat et fundati et eorum successoribus imperpetuum sub eadem conditione et ad eandem intentionem usus formam et effectus quibus superius declaratum est per me prefatum Johannem Dowman ad dictos Magistrum Socios et Scholares dicti Collegii Sancti Johannis Evangeliste tam pro sustentatione q^a pro admissione scholarium meorum de Poklyngton et non aliter neq^q alio modo Pro qua ordinatione fundatione et concessione et quolibet articulo ejusdem ordinationis [fundationis] et concessionis debite observand Nos predicti Magister ac Socii et Scholares Collegii predicti obligamus nos et successores nostros imperpetuum Briano Higden nunc Decano Eboraceñ et Capitulo ejusdem ecclesie et successoribus suis imperpetuum in pena quinq^q librarum solvendarum eisdem Decano et Capitulo et successoribus suis pro qualibet vice et pro quolibet mense in quo dicti quinq^q discipuli vel eorum aliquis non fuerit electus acceptus tractatus et admissus juxta tempus per statuta predicta assignatum vel quo mense eorum quilibet non plene gavisus fuerit predictis libertatibus et commodis eis concessis seu concedendis secundum ordinationes statutorum predictorum In cujus rei testimonium prefatus Johannes Dowman uni parti hujus scripti quadripartite indentati penes dictum Magistrum Socios et Scholares dicti Collegii Sancti Johannis Evangeliste in Universitate Cantabrigie remanenti sigillum suum apposuit Secunde vero parti hujus scripti quadripartite indentati penes dictum Magr̃m Joñem Dowman heredes et assignatos suos remanenti predicti Magis[?] Socii et Scholares dicti Collegii Sancti Johannis Evangeliste sigillum suum

commune apposuerunt Tertie vero parti hujus scripti quadripartite indentati penes Magr̃m Gardianos Fratres et Sorores fraternitatis sive Gilde [nominis] Jesu et beate Marie Virginis ac beati Nicholai Confessoris in villa de Poklyngton in Coñ Eboř per dictum Magistrum Johannem Dowman nuper erecte et fundate remanenti dicti Mağri Socii et Scholares dicti Collegii Sancti Johannis Evangeliste sigillum suum cõe apposuerunt Quarte vero parti hujus scripti quadripartite indentati penes Magr̃m sive Custodem et Scholares Collegii Xpi in Universitate Cantabrigie situať et fundati tam sigillum predicti Mağri Joñnis Dowman quam sigillum cõe predictorum Mağri Sociorum et Scolarum dicti Collegii Sancti Johannis Evangeliste presentibus sunt appensa Dať primo die mensis Decembris anno Dñi millesimo quingentesimo vicesimo quinto et anno regni Regis Henrici Octavi decimo septimo."

A translation of this endowment followed, and the plea concluded by an averment that the said deed so made and executed by the said John Dowman, and thereinbefore set forth, was the same deed as the deed of composition in the Information mentioned, as dated the 1st day of December, in the 17th year of the reign of King Henry VIII., and whereby the said John Dowman was in the Information alleged to have conveyed certain lands and hereditaments in the counties of York and Derby to the Master and Fellows of St. John's College, Cambridge, to such intent as was in the Information alleged.

LORD CHANCELLOR.—This question arises upon the pleadings, and cannot, in the only way in which the Court is, strictly speaking, called to consider it, finally decide the whole merits of the case, or settle the dispute between the parties, whichever

Feb. 12, 1834.

Instrument by which estates conveyed to a College, and five scholars added to the foundation, who are to have equal emoluments with the other scho-

lars; the rents being stated to be sufficient for the purpose, and the College expressing themselves to be well contented and satisfied; with a clause carrying the estates to another College upon default in admitting and sustaining such scholars. The College held to be beneficially entitled subject to the charge of maintaining the new scholars in the same way as the old.

A plea of the instrument, but without any averment that the College had always admitted and sustained the scholars, allowed; the information making no statement which rendered such an averment necessary.

On the principles of pleas.

A party taking a benefit, coupled with a burden and an office, shall not be permitted to use the powers of the office in order to lessen the burden.

way we dispose of it, although a part of the substance of the cause will now be disposed of.

The question, whether or not the plea has been well overruled, depends upon the shape of the pleadings, to which therefore we must very minutely refer.

The Information was filed by Mr. Attorney-General at the relation of private parties. It sets forth a writ of Privy Seal, dated the 4th of May, in the 6th year of Henry VIII., granting licence to John Dowman, Doctor of Laws, to found in Pocklington a guild or fraternity consisting of a master, two guardians, and others, and to convey to them lands to the value of twenty marks, in order to find a fit man sufficiently learned in grammatical science to instruct all scholars resorting to Pocklington. And the Information further states a deed called a deed of composition, dated the 1st of December, in the 17th year of Henry VIII., by which Dowman conveyed certain lands to the defendants, the master and fellows of St. John's College, Cambridge, to the intent that they should maintain in their College five scholars, to be nominated by the said fraternity, a preference being given to those of his own name and kin, and to young men educated at Pocklington Grammar School; and the Information further states an act of the 5th of King Edward VI., which, after noticing the dissolution of the aforesaid fraternity, gives to the College the power of appointing a schoolmaster for the said grammar school, and it gives to the said schoolmaster and the churchwardens

of Pocklington power to appoint an usher, and it incorporates the schoolmaster and usher, and enacts that upon vacancies in the five scholars the master of the school, together with the vicar and curate and churchwardens of Pocklington shall nominate such number of scholars out of the school as will supply the vacancies and present them to the College, and such scholars are to be received into the College and to have the like exhibition as any scholars presented by the said fraternity ought to have had according to the said John Dowman's composition ; and if the College omit to appoint a schoolmaster, and if the schoolmaster and churchwardens omit to appoint an usher, power of appointing both master and usher is given to the Archbishop of York. The Information then states a deed of feoffment of the 9th of January, in the 5th year of Queen Mary, but which is not material for our present purpose, and also an additional endowment in the 6th year of Queen Elizabeth. The Information then goes on to state that the College had been in the possession and enjoyment of the lands and hereditaments so conveyed to them in trust, and that the rents thereof have very greatly increased, and that the same amount to the sum of 600*l.* a-year ; and that the College had not for many years paid any sum for the maintenance of scholars from Pocklington school, but had applied the rents, except a small part amounting to 1*l.* 4*s.* 11*d.*, to their own use, and no scholars from the Pocklington school have for many years been maintained in the College, except in the

last year one scholar was allowed 1*l.* 4*s.* 11*d.* for his maintenance during his residence of one term at the College. The Information then proceeds to state that complaints have been frequently made by the inhabitants of Pocklington and those entitled to claim the benefit of the scholarships, with respect to the College not maintaining more scholars from the school in pursuance of the endowment, and not allowing the scholars a more liberal maintenance; and that applications have been made to the College to fill up the scholarships, and to make a proper allowance to the scholars; and in particular that the relators and other persons did require such matters by a written paper or notice, dated the 26th of February, 1831, and which is set forth verbatim in the Information.

Let us here stop to observe what the demand is on which the relators rest. Nothing can be more vague. It is a complaint with respect to the College not maintaining more scholars, and not allowing them more liberal maintenance, and an application generally to fill up the scholarships, and make proper allowance to the scholars. But when the particular application is stated, it is nothing of the kind; it is merely a statement that the parties feel aggrieved by the smallness of the allowance, a calling of the College's attention to the small proportion which that allowance bears to the rents, and an appeal, as it is termed, to them whether this is according to the endowment. The Information then charges that the College have refused to comply

with these requests. But if you take the whole of what is called the request together, it is not a requiring of any thing to be done, but a mere complaint of what is not done. Nay, if we reject the specific complaint stated, the written notice, February 26, 1831, and take the general statement, it is only a refusal to fill up the scholarships, and give the scholars proper maintenance, without any averment of the right of the parties applying or complaining to call upon the College, and without any specification of what is proper maintenance, unless indeed—which is the plain meaning of the whole statement—the total amount of the rents is to be taken as the measure of that proper maintenance.

Then, after the interrogating part, the Information prays an account of the lands and hereditaments conveyed to the College, and a declaration that all the rents and accumulations are applicable in maintaining the aforesaid five scholarships, and an account of such rents and accumulations, and a reference to the master to approve of a plan for the application of the same, and for the establishment of the said five scholarships.

I have gone through the whole of the Information as far as any thing in it is material to the question; and it clearly appears to consist of one thing, and one only—to present one case, and but one—that the whole estates of the gift of Dr. Dowman are held by the College in trust, or under contract, it signifies not which we call it, to expend the whole rents and profits in maintaining five scholars. It is equally clear, that no aver-

ment is made of a demand and refusal to maintain these scholars, or even to receive them. For it is only said that the College refused to comply with the requests before stated; and those, if taken from the notice in writing, are not requests at all; and, if taken from the preceding general statement, are only a request to fill up the scholarships, and allow proper maintenance. But, at all events, there is no statement whatever that any scholars were tendered by any one and refused; much less that any were nominated by those whom the Information states to have the right of nomination, or that those persons have ever joined in the complaints or demands made. But, what is still more material, there is no averment whatever that the scholars are not maintained by the College, and in the manner required by the endowment. On the contrary, suppose the written notice were as distinct a complaint or demand to that effect as words could convey, and that the previous statements of complaints and demands were as precise as they are vague and indefinite, we have only an allegation that certain things were asked to be done by certain persons, and that the College refused to do what those persons requested. To state that I refuse to comply with A.'s request to give B. a sum of money, is plainly no averment that I have not given B. that sum, or even generally that I have refused to give it him. It is the more necessary to keep this in view, because his Honor the Vice-Chancellor proceeds upon the assumption that the Information alleges that, in point of fact, the proper allowances have not been

made to the scholars of the College ; and certainly had it been so averred, we might have been entitled to hold that the plea should have negatived that averment ; because, when it raises another kind of allowance than the one insisted on by the Information, if there be any allegation in the Information which would apply to that other allowance, a plea would be imperfect,—would leave the case unanswered,—which did not meet such an allegation. But it is not to be found in any part of the Information.

Thus the Information presents the case that the whole estate is held in trust for the scholars, and that the College have received the rents and profits, and for many years maintained no scholars, except that last year one was allowed towards his maintenance *1l. 4s. 11d.*

To this there is a plea put in, consisting of the endowment and nothing more, the Information not having set it out ; and by that instrument it appears that there are several most important matters connected with the gift which the Information, in the very general and abridged statement there given of it, had not set forth ; and, among others, that the scholars were to have the same benefits and advantages with the other scholars, on the foundation of the College. The Vice-Chancellor overruled the plea, but not, as I understand, upon the ground that the endowment created a trust for the scholarships quoad the whole estate. His Honor, without deciding that question, though he seems to have intimated an opinion upon it, held that the plea was defective, in not averring that

the Pocklington scholars are allowed by the College the same maintenance with the others on their foundation. I do not agree with his Honor in this opinion; and I also think the plea sufficient, in other respects, to meet the Information as it is now framed. Two questions are thus raised; the one more nearly touching the substance of the cause—the other confined to the course of the pleading merely. First: Is the case in the Information met by the endowment pleaded?—Are the College entitled beneficially to the Dowman estates, subject to the particular charges specified in the deed; or are they only trustees, or otherwise bound to bestow the whole rents and profits of those estates on the scholarships? Secondly: Supposing the endowment meets the case in the Information, and that the College take the estate beneficially subject to the charge, was it necessary for the plea to aver the performance of the duty imposed by the gift, regard being had to the averments, or rather to the want of positive averments in the Information?

1. After the decisions which are so familiar in this Court, especially of late years, the first of these questions needs not detain us long. The whole of the reasoning, in the case of the *Attorney-General v. Mayor of Bristol*, 2 Jac. & Walk. 294—but, indeed, it might be said the principles recognized in all the other cases, from the *Thetford School* case, 8 Rep. 131, downwards—in some laid down, in others assumed, in none contradicted—and upon which the *Attorney-General v. Smithies* (ante, p. 5,) was lately decided here—entitle

us to conclude that the endowment before us is very plainly one which vests the beneficial interest in the College, subject to a charge to maintain five scholars, presented by the corporation of Pocklington school, and in a way pointed out,—to maintain them by allowances, which, though not specified in monies numbered, are ascertained by reference to the allowances of the other scholars on the foundation. I say that this appears very plainly; because, excepting in one particular, every thing in this deed is stronger for such a construction than in any of the other cases of which I can recollect the details. The particular I allude to is, that no sums of money are specified. Nor is there this specification in all those other cases; and it is manifest that it can make no kind of difference as to the present question, whether the founder stated the sums with which he charged his estates in the hands of the College, or directed so much to be paid as at any given time should be received by the other scholars. But in many important respects this endowment bears upon its face stronger indications of the founder's meaning than can be gathered from other endowments. The deed, which is in the form of an indenture quadripartite, Dr. Dowman being the first, and the College the second executing party to it, resembles a contract rather than an ordinary deed of endowment. But if it be only taken as if it had been a deed-poll from Dr. Dowman to the College, he gives the estates under the charges which he is thereafter to impose; and, after directing that the five Pocklington

scholars shall be maintained equally with the others in all respects, he adds, that the estates thus given to the College are sufficient for this purpose, and that the College and their advisers are content and satisfied to take the estates on these terms, "*contentati et placati existunt.*" He further declares a forfeiture of the estate to Christ's College, upon St. John's failing to perform the conditions. In short, the whole transaction resembles a bargain between the parties to do and receive certain things, or a gift of the estate by one to the other charged with certain outgoings; and none of those things are to be found in it, which have sometimes been held to show a distribution of the whole rents and profits among the persons to whom the feoffees are directed to pay; and sometimes to make it doubtful whether the feoffees or those payees were the principal objects of the foundation; as where the whole fund is exhausted by the payments prescribed, or where the gift is to both the feoffees and the others together, and in the same words. Upon the construction of the endowment, therefore, I entertain no doubt.

2. The second point was that upon which the decision of the Vice-Chancellor turned. His Honor held that, as the plea disclosed an obligation upon the College to give the Pocklington scholars equal benefits and emoluments with the other scholars of its foundation, it ought to have alleged that, in fulfilment of this obligation, such benefits had been given to those Pocklington scholars. I entertain a different opinion, and indeed have no doubt that such an allegation was unnecessary.

There can be no question that where the bill contains any allegations, which, if not denied, would defeat the plea—that is, make it possible that the matter of the plea should be true, and yet the complaint of the bill remain unanswered—those allegations must be negatived; otherwise, the plea does not perform its office; it is no defence against the bill. But where the bill is such that the whole of its averments may be admitted, and yet the plea being also admitted, the plaintiff's case is defeated, then the plea must needs be good. This is indeed the very strictest definition that I can give of a good plea; and proceeds upon the most correct view of its nature and office. Lord Eldon, in *Bayley v. Adams*, 6 Ves. 586,—where there is a large discussion of the principles of pleading, though not brought to any very definite conclusions,—seems to hold that a plea to a bill (like one to a count at law) admits the allegations in it, but avoids them by matter dehors. At any rate, this is unquestionable, that all a plea needs do is to displace the plaintiff's equity by new matter, admitting the matter of fact set forth in his bill. If that matter of fact is admitted, and the equity—the right to the discovery or relief sought—is denied in point of law, and no more; if the denial of the conclusion rests upon the facts as disclosed in the bill merely, it is a demurrer; if such denial rests upon other facts averred by the defendant, it is a plea. From hence it plainly follows, that the bill making one case, upon certain facts, if the plea sets forth other facts which displace that case whether the facts in the bill be true or not,

there is no occasion for further averments, although there may possibly arise a new case for the plaintiff upon the facts first disclosed by the plea. Nay, it is not even necessary to add averments where the facts pleaded are capable of explanation consistent with plaintiff's case, provided that explanation can only be attained through other facts. Thus, if a release be pleaded, and the consideration set forth, as it ought to be, the plea must be aided by averments, excluding any allegations in the bill which go to impeach that consideration—*Mitford*, 212; and *Roche v. Magell*, in the House of Lords, Lord Eldon and Lord Redesdale concurring, 2 Sch. & Lef. 721. But no such averments are said to be required, nor can they be, where the bill does not, as it were by anticipation, impeach the matter of the plea.

The careful examination into which I have already gone, of the allegations in this Information, clearly shows that the obvious principles just stated are applicable to the present case. The relators set up a trust in the College for the five scholars, and deny all beneficial interest in the estates conveyed to the College. The ground of this contention is the general statement of the conveyance, which as set forth may or may not be susceptible of the construction put upon it by the relators. The College propound by way of plea, the deed itself, and from its provisions, when examined, it appears that there is no such trust as the Information mentions. But it also appears that certain advantages are given to the five scholars, and that the College are bound to give

them the enjoyment of those advantages. If there had been any allegation in the Information denying that such advantages had been allowed them by the College, the plea would have been defective in not averring that the College had in this respect complied with the directions or conditions of the endowment. But no such allegation is to be found in the Information, nor is there any allegation that scholars from Pocklington were nominated by those whom the Information, as well as the plea, shows to be the only parties entitled to present for election by the College; nor is it distinctly alleged that *1l. 4s. 11d.* admitted by the Information to be allowed to one scholar, is not the sum to which he is entitled; nor that the election of persons to be scholars was refused, upon candidates being tendered by the parties authorized to present; nor that any refusal to maintain them according to the foundation was ever given to parties entitled to require it. Indeed it must be observed, that the Information is by only a very little way removed from ground on which it would have been demurrable.

A case which may be easily put will make the case before us sufficiently clear. Suppose a bill, before the late act of the 3 & 4 W. 4, c. 104, had alleged the deceased debtor to have charged his debts on his freehold and copyhold estates in general, and that there was a plea setting forth the will, which contained a charge on his estates in Yorkshire, and none other. To support this plea, and make it a defence to the whole statement of the bill, there must be an averment

that he had only leasehold estates in Yorkshire ; because without such averment non constat that he had not charged his debts at least upon his freehold estates in Yorkshire. But suppose the will as set forth contained no charge on any estate, but described the testator as having been in trade, without saying where, as "A. B., of Cheapside, merchant, dealer and chapman," it would clearly not be necessary to add an averment that he had ceased to be a trader at the time of his death, and so was not within the 47 Geo. 3, c. 74, although it might very possibly be true that he was such trader at his death, and that consequently the plaintiff might have a case against the real assets by operation of law, when his case on the charge by will had failed. The answer to this would be, "You have only alleged the charge by will, and that we have met ; when you amend your bill, and bring forward another case, it will be time for us to meet that also."

We need not inquire what the course would be, if in defence to one case another was set up by a statement, in which there was nothing equivocal, (as in the case put,) for instance, a description, by the plea, of the testator, as being a trader at the time of his death. Suffice it to say that is not this case, for the present question supposes the new case disclosed by the plea to be only one that may possibly serve the plaintiff's purpose, and require an averment to prevent the possibility of it so doing. The purpose of a plea is to raise a short issue of fact, which may at once

put an end to the suit; and an issue is an affirmation on one side, met by a negative on the other; nor can any one be called upon to negative an averment not made by his adversary, unless the negative be necessary to support some other averment which is made to meet that adversary's case. In the case put, every thing must be averred by the plea which is necessary to make it a complete defence against, or defeat of, the case made by the plaintiff, that the real estates were charged by the will; and the plea is bad if there remains a possibility in law of their being charged, though all that the plea avers were true. But nothing needs be averred which only precludes the plaintiff from availing himself of what the plea incidentally brings forward, and what might have been the ground of a new case on the bill. Thus, in the instance put, the defence to the case of the debts being charged on the real estates by the will, is as complete without an averment that he was not a trader at his death, as it would be with that averment. In like manner in the present case, if the deed set forth shows that the College are not trustees for the scholarships, it is enough, although it may disclose a duty to be performed by the College in respect of the possession of the estates, the performance of that duty being perfectly consistent with the allegations in the Information. But it would have been otherwise if any of these allegations had been so large as to cover the fact of the College not having performed their duty. It is clear from what passed below, that his Honor would not have overruled the plea for want of the aver-

ment, had he not read the Information as if it alleged de facto, that which it only states had been represented by certain persons.

Upon both the matters, then, now brought before the Court, I have a clear opinion; and holding the case made by the Information answered by the plea without any averment, I shall reverse the order overruling the plea. In consequence, however, of some observations which were thrown out during the argument, it is fit that I should advert to the duties which are imposed on St. John's College, and which the College have indeed distinctly undertaken to perform.

The visitation of Pocklington school is said to be of this number, but the visitatorial power appears to be somewhat anomalous. There is certainly some care and superintendence of that school required and undertaken. But suppose it amounted strictly to the full visitatorial power, the learned body in question would greatly, and let me add with all respect, perilously, mistake their position, were they to suppose that by any neglect of that duty, and much more by using the powers which they possess, so as to lessen the number of Pocklington scholars, they could evade the obligations in respect to such scholars imposed by the deed of endowment, and voluntarily undertaken by the College, when they received the estates under that charge. It never can be suffered that a trustee should protect himself against the charge of violating his trust, by using the powers which in some other capacity he possesses, so as to prevent objects from coming into existence,

and claiming the benefits of the fund confided to his care; nor can it be permitted to a party who has taken a benefit, coupled with a burden and with an office, to lessen the weight of the burden by abusing the powers of the office, so as to extinguish or diminish the number of those claimants upon him who were, in common with himself, the objects of the giver's regard. It is very far indeed from my belief that any such notions prevail in the halls, or guide the councils of St. John's College; or to suspect those who sustain its affairs, protecting it by their wisdom, exalting it by their learning, and adorning it by their character, of so far neglecting its best interests, and their own most sacred duties, as to pursue a course which would call for, and would inevitably receive, the correcting interposition of the law.

In reversing the judgment below, and allowing the plea, with repayment of the costs, if any have been paid, I shall also give the relators leave to amend. They ought to have set forth the deed; they had access to it in the same documents from which they took their summary of its objects. But it cannot be said that this omission is any deception practised upon the defendants, or on the Court; for the suppression could conceal nothing. I do not see any such misconduct as would entitle me to dismiss the Information; the more especially as the plea discloses matter to which it is very fit that an answer should be given, when that matter is put in the Information.

The deposit will of course be returned.

CASAMAJOR v. STRODE.

A PURCHASER of a portion of the estates of the late William Strode, esquire, which were sold under the decree of the Court, excepted to the Master's report approving of the title, on the ground that the premises formed part of allotments under an inclosure act, which appeared from the award to have been made in respect of a right of warren, for the extinguishment of which, if the same was extinguished, the act gave no power to grant compensation.

The exception was overruled by the Vice-Chancellor, and this was an appeal from his Honor's decision. The passages of the act and of the award upon which the question turned are sufficiently stated in the judgment.

For the exception, Sir E. Sugden, Mr. Teed, and Mr. Jemmett. Mr. Pepys, Mr. Knight, Mr. Hodgson, and Mr. Hovenden, in support of the Master's report.

The Chancellor was assisted by Lord Chief Justice Tindal, and the Right Honourable Mr. Justice Bosanquet.

Feb. 13, 1834.

Construction of an inclosure act and award under the same, as regarded allotments in respect of a right of warren.

LORD CHANCELLOR.—The question is, whether a good title can be made to lot No. 25, part of the Northaw estates, late belonging to William Strode, Esq., with reference to the power of the Commissioners under the Northaw inclosure act, passed in the 43d year of Geo. 3, and to the form of the Commissioners' award.

It appears by the recitals of that act, that there was within the said parish a tract of waste land and common containing about 2150 acres, and that Mr. Strode as lord of the manor was seised of or entitled to the soil and royalties within the

same, and as lay rector of the parish was entitled to all tithes, both great and small, arising within the same; and claimed right of common in respect of the soil and royalties on the waste land and common; and that there were within the manor and parish several messuages, tenements, lofts, homesteads, and old inclosed lands, the proprietors of which claimed to be entitled to a right of common upon the tract of waste land and common. After these recitals it is enacted, amongst other things, that the Commissioners thereby appointed should, after deducting such parts of the waste land and common as they might think proper to set out for the public highways, roads and drains, set out and award to Mr. Strode, his heirs and assigns, as a compensation for the soil of the waste land and common, as lord of the manor, one full 18th part (quantity and quality considered) of all the residue of the waste land and common over and above and exclusive of such share and allotment of the waste land and common, or the residue thereof, as was thereafter directed to be allotted to him in lieu of his right of common therein; and also should award to Mr. Strode, his heirs and assigns, as a compensation for the impropriate tithes due and payable to him as aforesaid, one eighth part of the residue of the waste land and common over, above, and exclusive of such share or allotment as last aforesaid, in exoneration of all the waste land and common then intended to be inclosed from all tithes, both great and small, for ever thereafter; and after making such deductions as afore-

said, and after such parts of the whole residue of the waste land and common should have been set out and allotted to Mr. Strobe in manner aforesaid, the Commissioners were required to divide all the residue of the waste land and common amongst Mr. Strobe and the several other persons having any right of common upon such waste land and common, in proportion to their respective claims, &c. The act then contains a proviso, that nothing therein contained should prejudice Mr. Strobe's right or title as lord of the manor to the seignory and royalties belonging to the manor, but that he, his heirs and assigns, should hold and enjoy all courts, perquisites, and profits of courts, rents, waifs, estrays, mines, minerals and quarries, and all royalties, jurisdictions, matters and things to the manor belonging or appertaining, in as ample a manner as he or they might have done if that act had not been made.

Now the Commissioners, by their award, dated the 29th August 1806, made four distinct allotments to Mr. Strobe, in respect of four distinct rights or claims of his. First, they allot to him and his heirs a piece of freehold land, containing 102 acres, entirely surrounding the warrener's house and garden, which they declare to be in compensation for all his right, title, and interest in the said warren. Secondly, they make an allotment to him of 81 acres, 3 roods, 38 perches, which they declare to be a full compensation for all his right and interest in and to the soil of the common and waste ground in the parish of Northaw.

Thirdly, they allot to him, as lay rector, a piece of freehold land, containing 67 acres, 1 rood, 37 perches, and 104 acres, 2 roods, 15 perches, making together 172 acres, 12 perches, therein described, which they declare to be a full compensation to him for all his inappropriate tithes within the parish. And fourthly, they divide, set out, and allot to the said William Strode and the other proprietors respectively, all the residue of the lands and grounds directed to be inclosed, which they declare to be a compensation for their several and respective rights of common and other their rights and interests therein; and after describing particularly the different allotments made to the said William Strode, they declare them to be in full compensation to him "for all his right, title, and interest in and to all the lands and grounds within the said parish of Northaw, directed to be divided and inclosed."

No question can arise in this case as to the allotments secondly, thirdly, and lastly above made; for there can be no doubt that the Commissioners had the right to give, and that they have accordingly given to Mr. Strode allotments for his right of soil, as lord of the manor; for his inappropriate tithes, as lay rector; and for his rights of common and other rights in respect of his lands within the parish. But the question is, whether the Commissioners had any authority to make the first allotment to him for and in lieu of his right, title, and interest to or in the warren. And we think, upon the due construction of the act, the Commissioners had no authority

to make such allotment; and, consequently, so far as depends on the power of the Commissioners, under the act of parliament, Mr. Strode cannot make a good title to such allotment. The precise forms of the claims sent in by Mr. Strode have not been brought before the Court; but, looking to the allotment first made, there can be but little doubt that one of the claims was for a compensation for the right of warren over the waste land and common which was to be divided under the act, or some part thereof; for the form of the allotment is "a piece of freehold land, entirely surrounding the warrener's house and garden, which the Commissioners declare to be in compensation for all his right, title, and interest in the said warren." The award itself shows that there had been a house upon the waste, known as the warrener's house and garden; and the allotment was evidently given as a compensation for a claim of warren.

The first point therefore to be ascertained is, whether a right of warren was a right which it was intended the Commissioners should have authority under the act to extinguish.

The right of warren, in its proper sense, is a privilege distinct from the land—a privilege which a man claims, by grant or prescription, to have beasts of warren in his lands or demesnes—"ita quod nullus intret, ad fugandum vel ad capiendum quod ad warrennam pertinet." Such a right was, therefore, in the common use of that word, a royalty belonging to Mr. Strode, either by prescription or grant, as lord of the manor,

over the common or part of the common or waste lands intended to be inclosed. It appears, indeed, by the recitals of the act, that Mr. Strode claimed some royalties; and the recital further states, perhaps somewhat inaccurately, that he claimed right of common in respect of the royalties as well as the soil.

Now that the Commissioners had no direct authority to give an allotment as a compensation for a royalty, appears by the enumeration already made of the authorities conferred upon them by the act, amongst which there is no mention of a power to grant such compensation; and it appears still farther, from the saving clause in the act, that it was not the intention that the royalties should be extinguished; for, by that clause, the seigniories and royalties are reserved to the lord, with particular provisions in respect of the exercise of the royalty of mines.

But it has been argued on the part of the sellers, that it is not necessary to consider the warren as a royalty, but that it may be well understood to mean in common parlance a place in which rabbits or other animals of warren are kept. It does not, however, appear to us that the difficulty is removed by such an interpretation. For, if the word "warren," as used by the Commissioners in their award, is applied to a portion of the common or waste land in which the lord of the manor claimed and exercised the right of having rabbit burrows on the surface, the soil of such common or waste land being already in the lord; it is still necessary to show under what

power in the act the Commissioners extinguished the right of the other commoners over this part of the common. For the award cannot give a title to allotments in respect of rights, which are not authorized to be extinguished under the powers conferred by the act.

The decision, therefore, of the Court of Common Pleas, in the case of *Phillips v. Maile*, 7 Bing. 133, does not apply to the present case. In that case no other point was decided than that it was unnecessary for the party who claimed a right of common which had been allotted to him by the Commissioners under an inclosure act over a certain limited inclosure, as a compensation for a right of common over a larger waste, to state in his pleadings his title to his original right of common: for, as such title had not been disputed in the mode prescribed by the act, it was held that it must be taken to be admitted by all who were parties to the act. But here the objection is widely different; it lies upon the surface of the award; the Commissioners having adjudicated an allotment in respect of a right, for which the statute gave them no authority to grant any compensation.

It appears, therefore, that the allotment, as a compensation for the right of warren, is to be considered as if the portion of waste land whereof it consists had not been allotted at all: and, if this were the case, the representatives of Mr. Strode, in respect of his right of soil, would be entitled to one-eighth part only of the 102 acres comprised in that allotment, in respect of his im-

propriate tithes, and the proprietors having right of common (including Mr. Strode) to all the rest.

It may be said that Mr. Strode's right to the soil having existed before the act of parliament, his title to the soil is independent of the award, and that all rights of common over it have been extinguished by the compensation received by the commoners under the award. But if the commoners, on their part, have received compensation for all their rights of common over the 102 acres in question, Mr. Strode has also, on his part, received compensation for all his rights of soil in the same portion of the waste. The compensation to both, however, has been made out of a fund, a portion of which remains undisposed of by any legal authority.

It may be difficult, practically speaking, to point out any mode by which Mr. Strode's representatives at this time, after an adverse enjoyment since 1806, could be disturbed in the exclusive possession of the land comprised in the allotments; but still, upon the question whether Mr. Strode acquired a title to this allotment under the Commissioners' award, we think that no such title was acquired.

The exception must therefore be allowed, as far as regards the lots in question contracted to be purchased from Mr. Strode, and the deposit returned.

HOLLAND v. PRIOR.

THE judgment comprehends all the circumstances.

For the demurrer, Mr. Pepys and Mr. Wakefield. For the bill, Mr. Stinton and Mr. Bethell.

Feb. 15, 1834.

The executor or administrator of a deceased executor or administrator stated to have received monies in that character, although sometimes treated as a mere debtor to the estate of the original testator or intestate, is properly made a defendant, together with the continuing executor or new administrator of such testator or intestate, in a suit for the administration of his assets.

LORD CHANCELLOR.—The demurrer which his Honor the Vice-Chancellor allowed in this case, and which is brought here by appeal from his decision, raises a question of considerable moment to the practice of the Court, and of some importance to the principles upon which proceedings in equity are grounded. I therefore took time to examine it, and to satisfy myself as to the course which professional men had adopted in their practice, both in this and other jurisdictions. The result of the consideration which I have been able to give the subject, is a clear opinion that the rule which I conceived at the hearing to be most consistent, both with principles and with convenience, is the one which is sanctioned by precedent, by the authorities, and by the ordinary practice of the profession.

The case was this:—William Phelps, being indebted to the plaintiff, F. Holland, by bond for 1500*l.*, died seised of real estate and possessed of personal estate, having by will devised the former upon certain trusts for the benefit of his two daughters, Betsy Olive and Mary Prior, and appointed his son-in-law, James Sutton Olive, his executor. Olive, never having proved the will, died, having devised the said real estate to

new trustees ; and administration of the estate of William Phelps, with his will and codicils annexed, was granted to Betsy Olive. Mrs. Olive afterwards died, leaving Anthony Sproule her executor, who proved her will. William Prior then procured letters of administration de bonis non of the estate and effects of William Phelps to be granted to him, and became his sole legal personal representative. Mary Prior also died. Holland then filed his bill, stating the foregoing facts, and that Mrs. Olive possessed herself of personalty of William Phelps, and had paid certain of his debts, and that at the time of her death, she had in her hands part of his estate unadministered. The bill, to which the heirs at law of the testator and of his daughters are parties, prays in the usual form the account of all the specialty debts, and of the estate come to Mrs. Olive's hands, and that Sproule, as her executor, may pay whatever may be found due from her ; and that if Sproule shall not admit assets he may account for his receipts and payments ; and in case of the insufficiency of William Phelps' personal estate, it is prayed that the deficiency may be supplied by a sale of the real estate. Sproule demurred for want of equity, and the demurrer was allowed. The question is, therefore, whether the executor of an administratrix, who had received assets of the person represented by her, can be made a party to a suit instituted by the creditor of that person ; and I am of opinion that he may, and that he ought to be made a defendant in such a suit as this.

I shall first state the doctrine which is applica-

ble to the question, as it stands upon principle, as it is recognized by authority, and as it is to be extracted from the cases. I shall then advert more particularly to these cases, and finally to the practice in the Courts.

Although the general principle of the Court, for preventing multiplicity of suits and avoiding circuity of proceeding, is to bring all the parties concerned in the subject-matter before it, and to adjudicate once for all among them—the Court delighting, as Lord Talbot says in one of the cases, to do complete justice, and not by halves; and although this would lead, in administering the assets of deceased persons, to going beyond the personal representatives, following the estate of the deceased, and taking note of his credits, and consequently bringing forward his debtors; yet the greater inconvenience, which would arise from an unrestrained pursuit of all his property and consideration of all his claims, has prescribed bounds to the inquiry; and accordingly the rule is to stop short at the personal representatives, unless where there is insolvency, or where other parties stand in such relation to the deceased, or his estate, or his representatives, that they may be said either to have been mixed with him and his affairs during his life, or to have aided his representatives after his decease in withdrawing his estate from his creditors, or to have undertaken more directly a quasi representation of him. Within the first of these descriptions come the partners of the deceased, against whom the creditor may go, as well as the executor or administrator. Under the second description falls the case of those who, by collusion

with the personal representatives, have received or wasted his property. The last is the case of those who have become executors or administrators of his deceased personal representative. The second case—that of collusion with the personal representatives—may be likened to that of an executor *de son tort*, a representation fixed upon those who intermeddle with the estate, as the penalty of their interference. While the last more resembles a direct representation, undertaken voluntarily by probate or administration. I say *resembles* it, and no more; for it is not direct representation of the deceased, and although it comes much nearer to it in one case than the other, yet to that case we are not for the present purpose at liberty to confine it by the authorities and the practice, although certainly the strict principle would oblige us to do so. Where the party made defendant is executor of the executor, there is, if the latter were sole or surviving executor, a direct representation of the first deceased; and if he were not sole or surviving executor, there is nevertheless what approaches very near to a direct representation; but where the party made defendant is only administrator of the executor or of the administrator, then the chain of representation is broken, because an administrator does not represent. An administrator is only an officer intrusted by the consistorial courts; consequently, his executor or his administrator does not represent the first deceased. We might therefore, if disposed to regard the utmost strictness of principle, hold that the executor of an executor ought in circumstances like those before us to be made

a party—indeed, just as much as the first executor himself; for the one mediately represents the deceased, the other immediately—but that the executor of an administrator, or the administrator of an executor, or the administrator of an administrator, should not in any case be made a party, because there is no representation. It appears, however, that the distinction is not taken; and for this reason, in all probability, that it makes little practical difference in what capacity the administration of the deceased personal representative's estate, or of the estate of the first deceased, vests in any one; whether by the ecclesiastical judicature entrusting it, or the deceased devolving it to him. It is convenient upon some occasions to have the representative of a representative before the Court; and the line is easily drawn to separate the case from that of the body of ordinary debtors to the estate. There is a privity between the first deceased and the executor of his administrator or the administrator of his administrator, (as there unquestionably is between him and the executor of his executor,) if not in the strict sense of the word, yet a privity in a sense—a quasi privity; and what, in laying down such rules, is of great moment, no one can be at a loss for the distinction, or can fail to trace the line which separates this case from that of a person merely indebted to the estate of the deceased, or against whom the deceased might have had, or his representative may have, some legal or equitable claim. It must, however, be observed, that where the representative character is material, and must be followed strictly, the incapacity of an admi-

nistrator to transmit the representative character is at once perceived. Thus the executor of an administrator cannot bring a suit on behalf of the intestate's estate; nor can he revive a bill brought by the administrator, quasi administrator. *Mitford*, 203. *Huggins v. York Buildings Company*, 2 Atk. 44. But, for the present purpose, it will be seen, the like strictness does not appear to be known either in Courts of Equity or in Doctors' Commons.

The view we are taking of the subject removes the whole of the argument urged against bringing before the Court the representative of an executor or administrator. For when it is said that there is no privity between him and the first deceased; that he is a mere debtor as it were of the continuing or existing executor or administrator; that the debtors of the first deceased person are never made parties; and that, as was very strongly put by Mr. Pepys, there is no greater inconvenience in not calling—in not bringing before the Court—such a debtor, than in not calling the immediate debtor of the first deceased himself, which *ex concessis*, except under special circumstances, you cannot do,—it is manifest that all these points are made upon the supposition that the representative of an executor or administrator is only a debtor, as regards the estate of the first deceased,—a debtor to the continuing or existing executor or administrator; whereas he really stands in a relation very different, representing in some sort the first deceased. If then it be meant that there is as much inconvenience in not bringing before the Court A.'s debtor, as in not bringing before it the debtor of

A.'s representative, the answer is, that we are seeking to bring him before the Court, not quasi an ordinary debtor, but as the representative of a person, who in the character of executor or administrator, has received A.'s assets, and represents in some degree his estate, as well as owes a debt to it.

It must further be observed, that such arguments would be more admissible had the Court drawn the line closer, and allowed none except the actual representative, whether executor or administrator, to be called. But there is no consistency in having stretched it so as to take in the partners in trade of the deceased, and those who have helped the personal representative to waste the estate; while those who, by that personal representative's appointment, represent his estate, or by order of the Ecclesiastical Court administer it, are excluded.

The cases which have been decided, varying perhaps more in the language of the dicta than in the resolutions, support the position which I have taken. Where some dicta of the earlier authorities appear to go beyond it, and thus to prove too much, according to the notions now received, we may presume that inaccuracies prevail in the reports. *Nicholson v. Sherman*, soon after the restoration, is reported in the First Volume of Chancery Cases, p. 57, and the language of it, if literally taken, would seem to place no limits to the pursuit of the debtor's estate. As regards the decision, I have caused search to be made in the Register's Book, that it might be ascertained if collusion was alleged in the bill; and

it does certainly appear that the plaintiff charges the executrix of the executor, and her son, with having secretly and privily obtained and got into their hands and possession the goods and chattels of the first deceased left unadministered by his executor, and there is besides a charge of mind-ing and intending to deceive and defraud the plaintiff of his legacy.

The rule has been given more precisely in succeeding cases, though with some variation in the dicta that have accompanied their decision. Lord Hardwicke, in *Newland v. Champion*, 1 Ves. sen., 105,—while he lays it down that persons who have possessed themselves of the property, or who are debtors to the estate generally, cannot be made defendants without collusion charged—adds, that the case of partnership is different, and that it is very usual to make the surviving partners defendants. The reason he gives deserves to be remarked; it is, that there may be an account of the personal estate entire. And in *Bickley v. Dorrington*, cited by Lord Eldon, in *Alsager v. Rowley*, 6 Ves. 749, from a MS. note of Mr. Brown, confirmed by Lord Hardwicke's own notes, which Mr. West has since published, (West, 169,) it is said that a debtor cannot be made a party without charge of collusion, insolvency, or some special case; thus by no means limiting it to collusion and insolvency. *Fotherby v. Pate*, 3 Atk. 603, decides nothing the other way; but it contains an assertion sufficiently large of the right to follow assets into any hands when there is collusion; and the dictum relied upon

in the argument at the bar, concerns an administrator durante minore ætate, where his office has expired, and the executor has entered upon his duty. It must also be observed, that Lord Hardwicke had some years before decided, that the administrator durante minore ætate must be made a party as well as the executor who has come of age, unless the whole personal estate had been received by the latter from the administrator's hands; *Glass v. Oxenham*, 2 Atk. 121. But *Williams v. Williams*, 9 Mod. 299, if accurately reported, and not over-ruled, is a case upon the very point; for Lord Hardwicke there held the representative of the deceased executor to be a necessary party to a suit by a legatee against the surviving executor and the heir at law. Applying that decision to the present case, it would have given the heir at law a right to demur to the bill, if A. Sproule had not been made a co-defendant with him. *Bowsher v. Watkins*, 1 Russ. & Myl. 277, was a bill by the residuary legatee of a trader deceased, and the executor was made defendant, together with the surviving partner. To this an objection being taken, that there was no collusion charged against the latter, but only negligence, and that the partner was only in the situation of a mere debtor in equity to the estate, which, without collusion, is insufficient, the Master of the Rolls held, that he was well made a party. The same learned Judge, in another case, *Gedge v. Traill*, given in the note to *Bowsher v. Watkins* (p. 281), over-ruled a demurrer to a creditor's bill which had made the co-partners co-defendants with the executor, upon the ground that a stranger's retaining

assets, with consent of the executor, was collusion.

The course pursued in questions of a like nature, in the Ecclesiastical Courts, well deserves our attention. I agree that, in matters of mere form, which are arbitrary in their origin, and the creatures of positive rule or the growth of practice, such authorities may go for little ; and so of all matters of practice—and, we may add, of pleading. But where it is a point of principle, on a subject upon which those Courts have a jurisdiction similar to our own, and in a branch of the law which had a common origin with that which is administered here, the Consistorial decisions are deservedly of much weight. Now there seems no doubt of those Courts recognizing, for purposes similar to that of the present suit, the propriety of making the representative of a deceased executor a party. The question arose a few years ago, in the Prerogative Court, and the present objection being taken, Sir J. Nicholl, upon hearing it argued, decided against it ; *Gale v. Luttrell*, 2 Addams, 234. The survivor of two executors of a debtor by specialty, deceased, was cited by the administratrix of the bond creditor, and with him was also cited the executor of the executor who was dead ; and the question was, whether he as well as the surviving executor should be party to a suit for producing an inventory of the deceased's estate and effects. The ground of the objection taken was the same with that relied upon here—that the representative of such executor did not represent the de-

ceased debtor. The Court held him bound to produce an inventory, though there appears to have been no statement that he had obtained possession of the deceased debtor's property, but only that his testator, the first executor, had possessed part of it. The principle of the decision was, that the other party had a right to know what had become of his debtor's property; and to know it from his executor's representative, evidently because of his representative capacity; for in no other way could any privity be made out. But he only represented one of the executors, and not the deceased debtor, there being another executor living of that debtor.

It is material that we should lastly observe what has been and is the practice. According to the best information I have been able to obtain, it has been to make the executor or administrator of a debtor's executor or administrator party to the suit, at the instance of that debtor's creditor, together with the surviving or present executor or administrator. The form of a decree in such a suit is before me; I have been furnished with it from the Registrar's office, where, I understand, no doubt prevails touching the practice. After directing an account of the plaintiff's debt, and advertisements for other creditors, and the usual account against the surviving executor, it proceeds to direct an account to be taken of the personal estate of the testator, come to the hands of John Doe, his executor, since deceased, in his lifetime; and to the hands of the defendant, Richard Roe, the sole executor of John Doe, since his decease; or to the hands of any other person

or persons, by either of their orders, or for either of their use: and it directs the amount due from John Doe to be answered by Richard Roe, out of the assets of John Doe. If John Doe, instead of being one of two executors, had taken administration (which is the present case) and received assets of the intestate, the decree could not upon any intelligible distinction be varied, except by changing the word "executor" for "administrator."

It has been argued that there is a difference, between the case of an executor, and that of an administrator, but in the Ecclesiastical Court, where, if any where, we should have expected the distinction contended for would be taken, or rather pursued more closely, I find that it is not regarded. The executor of an executor, or the administrator of an executor, or the executor of an administrator, or the administrator of an administrator, are called on to exhibit an inventory alike, together with the surviving or present executor or administrator; not indeed as a matter of course, which the deceased executor or administrator himself would be, but on reasonable cause shown, as in the case already cited from the Commons, of *Gale v. Luttrell*. There is another case, of *Ritchie v. Rees*, 1 Addams, 144, materially bearing upon the question now before us. It was there ruled, upon deliberation, that the representatives of a deceased administrator, although not at the same time those of the first testator, were liable to exhibit an inventory, if there was a reasonable presumption that the effects of the first testator had travelled into other hands. The object there was merely to discover whether there

were any effects to which an administration de bonis non could apply, but the reasoning is important. In the case at bar, the goods of the first deceased are alleged (which, of course, on demurrer, we are to take for the fact) to have come to the hands of the deceased administratrix, Betsey Olive; and sufficient assets of Betsey Olive to satisfy what was due from her estate to that of the testator, W. Phelps, are alleged to have come to the hands of the defendant, A. Sproule, her executor, which would be quite enough to bring the case within the principle that may be considered to be laid down in the concluding part of the judgment in *Ritchie v. Rees*; because it is wholly immaterial whether the specific chattels came to the defendant's hands or no, whether the monies were earmarked or no. But the bill further alleges a demand made of Betsey Olive and A. Sproule, and a refusal, upon the allegation that the effects of the testator come to their hands *respectively* were insufficient to pay the debt, and then charges the contrary thereof to be true, and that the same will appear, if A. Sproule will set forth his account of the effects of the testator's estate come to Betsey Olive's hands, and of the application thereof, which must be taken to be an allegation of assets of W. Phelps, come into A. Sproule's hands.

The practice so generally followed has obviously a great convenience. There is nothing whatever upon principle to differ the subject in the two Courts; and it should seem that here, as there, this course has always, or almost al-

ways, been adopted. It is recommended, too, by the important circumstance of its being the established practice. Its advantages would lead us to regret that it had been otherwise, if the fact were so; and if those advantages were less manifest, its existence would be reason enough for abiding by what seems settled in use.

Reference was made to the decision here, in another cause relating to the same estate, *Phelps v. Sproule*, reversing an order of the Vice-Chancellor allowing a plea. The defendant Sproule's plea, which was filed in that suit on 27th August, 1831, does not apply to the point now before the Court. He pleaded a release; and, by answer, denied collusion with the other defendants. The Court determined that the plaintiff was entitled to such a plea as would give him an issue, not merely to try the legal bar, but the accompaniment of that bar by any equitable circumstances capable of defeating it.

I am therefore of opinion that the decree below allowing the demurrer ought not to stand, and that the demurrer must be overruled, and the defendant ordered to answer.

The deposit, of course, will be returned, and any costs below that have been paid must be refunded.

His Lordship stated that the bill in *Nicholson v. Sherman*, cited in the judgment, was to this effect:—

“That the said Margaret Sherman, relict and executrix of the said William Sherman, and the said James Sherman, her son, having no regard to the execution of the said last will and testament of the said James Glassbrooke, minding and intending your said orator to deceive and defraud of the said legacies so

devised to your said orator by the said last will and testament of the said James Glassbrooke, to be doubled at the death of the executrix of the said James Glassbrooke, have, ever since the death of the said Joane, the executrix of the said James Glassbrooke, denied, and yet do deny, to pay your said orator the double of the said legacy, or any part thereof, although your said orator has oftentimes, and in a very friendly manner, requested the said Margaret and James to pay the same: and forasmuch as the said Margaret and James have secretly and privily obtained and got into their hands and possession the goods and chattels of the said James Glassbrooke, by the said Joane at the time of her death unadministered, amounting in the whole to above 10,000*l.*, as your orator doth believe and has been informed, and yet the said Margaret and James Sherman pretend that there is not sufficient of the estate of the said James Glassbrooke come to their hands to double the said legacy, and still refuse to pay and double the said legacy due to your orator, namely, to make the said 100*l.* 200*l.*, and pay it accordingly. In consideration whereof, &c."

Ex parte BARDWELL, *Re* VENABLES.

THE judgment embodies all the circumstances not disclosed by the warrant of commitment, of which the ensuing is a copy, with the exception of the two examinations, and these are omitted, as all the points in the case may be fully understood without their aid.

"WHEREAS a fiat in bankruptcy, bearing date the 28th day of January, 1834, was issued and is now in prosecution against William Venables, of, &c., under which he hath been duly adjudged bankrupt. And whereas one John Jex Bardwell, being a person who was suspected to have obtained part of the estate and effects of the said bankrupt by means of certain colourable fictitious sales thereof made to him the said John Jex Bardwell by the said bankrupt, was duly summoned to appear, and did, pursuant to such summons, appear at the Court of Bankruptcy, Basinghall Street, on the 5th day of February instant, before Edward Holroyd, Esq., a Commissioner of the said Court of Bankruptcy, acting in pursuance of the said fiat, for the purpose of

being examined touching and concerning certain matters which the said Commissioner, by force of the several statutes now in force concerning bankrupts, was authorized to inquire into; and the said John Jex Bardwell being duly sworn true answer to make to the several questions put to him, and the several questions next following being put to him, he, on his oath, answered as is subjoined hereunder respectively. [That day's examination was here set out; the warrant then proceeded.] And whereas the said John Jex Bardwell, being attended by a solicitor on his behalf, appeared at the Court of Bankruptcy aforesaid on the 11th day of February instant, pursuant to summons, before the said Commissioner, for the purpose of being examined touching and concerning the matters aforesaid; the said several questions and answers so put and given on the examination aforesaid were read over in the presence and hearing of the said Commissioner and of the said John Jex Bardwell; and being duly sworn true answer to make to the several questions put to him, he, on his oath, answered as is subjoined hereafter respectively, which said last-mentioned questions and answers are as follows. [The examination of that day was set out, and the warrant then proceeded.] And whereas the answers of the said John Jex Bardwell so given by him in the several examinations aforesaid having been unsatisfactory to the said Commissioner, he, the said Commissioner, did, on the said 11th day of February instant, duly commit the said John Jex Bardwell to the care and custody of James Johnstone, one of the messengers of the said Court, to be by the said James Johnstone detained in his custody, and brought up before a Subdivision Court, to be holden on the then following day, being this 12th day of February and to which Subdivision Court the said Commissioner did adjourn the examination of the said John Jex Bardwell. And whereas the said John Jex Bardwell having been duly brought up before us, whose names and seals are hereunto annexed, constituting a Subdivision Court, the said several questions and answers so put and given on the said several examinations aforesaid were read over in the presence of and hearing of us, and of the said John Jex Bardwell; and the said John Jex Bardwell being duly sworn true answer to make to the several questions put to him, and the several questions following being put to him, he, on his oath, answered as is subjoined hereafter respectively as follows:—' Q. You have heard your exa-

minations read over, and your answers to them, do you abide by them?—*A.* I do. *Q.* Have you any explanation to give thereon?—*A.* No. I am ready to answer any question you may put to me. *Q.* Did you give Dufton any thing for his services?—*A.* I made no agreement with him, nor have had any settlement with him. *Q.* Do you wish to add any thing to your examination, or explain any part of it?—*A.* I do not. *Q.* Do you then abide by your answers?—*A.* I do.' Which said answers so given on the said several examinations as aforesaid by the said John Jex Bardwell not being satisfactory to us, these are therefore to will and require and authorize you, immediately upon receipt hereof, to take into your custody the body of the said John Jex Bardwell, and him safely convey to his majesty's prison of Newgate, and him there to deliver to the keeper of the said prison, who is hereby required and authorized, by virtue of the statutes aforesaid, to receive the said John Jex Bardwell into his custody, and him safely to keep and detain without bail or mainprize, until such time as he shall submit himself to us, and full answer make, to our satisfaction, to the questions so put to him as aforesaid; and for so doing this shall be your sufficient warrant. Given under our hands and seals, at the Court of Bankruptcy, in Basinghall Street, this 12th day of February, 1834.

J. H. MERIVALE.

J. S. M. FONBLANQUE.

E. HOLROYD."

Counsel for the prisoner, Mr. Pepys, Mr. Ching, and Mr. Bethell. For the assignees, Mr. Attorney-General and Mr. J. Russell.

Feb. 17, 1834.

It is no objection to a warrant committing a witness under the provisions of the act to establish a Court in Bankruptcy, that it recites that he was a person suspected to have obtained part of the bankrupt's estate, by means of certain colourable fictitious sales.

Nor is it an objection to such warrant that it does not state precisely which were the unsatisfactory answers.

Nor that some of the questions put relate not to sales by the bankrupt to the witness but to other individuals.

The Court, to which the examination of a person in the custody of a messenger is adjourned, must not merely continue the examination, but must examine *de novo*.

LORD CHANCELLOR.—In this case it is necessary to go at large into all the objections, with a view to the settlement of the practice of the Court of Bankruptcy in the important matter of commitment, in which the Commissioners now

act judicially, and without being liable to an action, as they were formerly.

John Jex Bardwell was summoned to appear and did appear, on the 5th day of February, at the Court of Bankruptcy, before a Commissioner of the Court acting in prosecution of a fiat under which William Venables had been duly adjudged bankrupt, for the purpose of being examined touching certain matters connected with the bankruptcy; and, being sworn, he was accordingly examined at some length. The examination was continued upon the 11th February, before the said Commissioner. J. J. Bardwell being then attended by his solicitor, and his answer being unsatisfactory to the Commissioner, he was committed to the provisional custody of the messenger, according to the provisions of the act 1 & 2 Will. 4, c. 56, s. 7; and a Subdivision Court was holden the next day, when his former examinations being read over to him in presence of the three Commissioners, he was asked if he abided by them, and said he did; and if he had any explanation to give, and said he had not, but was ready to answer any question put. One question upon the subject-matter of the former examination was then put, which he answered in a manner that, taking the question by itself, could not be deemed unsatisfactory or in any way objectionable; and being again asked if he wished to add any thing by way of explanation, he said, he did not; and if he abided by his answers, and he said, he did. The Subdivision Court deeming the answers given upon the said several examinations not satisfactory, proceeded to commit him.

The warrant which is brought before me, as the return to the writ of habeas corpus which I issued to bring up the body of the prisoner, sets forth the above matters, and the examinations at large ; and the first objection taken to it is, that it recites also, what is said to be unnecessary and detrimental to the party, that he was a person suspected to have obtained part of the estate and effects of the bankrupt, by means of certain colourable and fictitious sales thereof made to him by the bankrupt. But there is nothing at all objectionable in this recital. It is quite within the description of the enactment, giving the Commissioners power to summon and examine persons other than the bankrupt, 6 Geo. 4, c. 16, s. 33. It is within the particular description of any person suspected to have any of the bankrupt's estate in his possession ; and it is within the more general description of any person whom the Commissioners believe capable of giving information concerning the dealings or estate of the bankrupt ; and also within the yet more general description of any person believed capable of giving any information material to the full disclosure of the bankrupt's dealings. All these matters—as to the import of all these expressions — were very fully discussed many years ago in the Court of King's Bench, and more than once since the 6 Geo. 4. Had those expressions been followed, no such objection could have been taken ; but the language used is more specific, and so far from being detrimental to the party, it profits him much by giving him a more precise knowledge of the charge against him. If this particu-

larity was used in the summons, although there was no necessity for using it, it materially benefitted him, for he thereby had more distinct knowledge of the matter alleged respecting him. If it is only used in the warrant, he has an advantage, though a lesser one, in the fuller information upon which he comes up to maintain his right to be discharged. However, even if there had been any thing in this formal objection, yet the statute (6 Geo. 4, c. 16, s. 39,) would oblige the Court to enter upon the merits; and, notwithstanding any such defect of mere form, to recommit, if the merits required it. If precedents were wanting on so clear a point, *Ex parte Vogel*, 2 Barn. & Ald. 219, might be referred to, where the warrant contained only similar specifications of the suspicion entertained; and though every other objection was taken to it, none was attempted on this ground.

The next objection taken goes more to the substance. The warrant, it is said, does not state precisely what answers were those with which the Commissioners were not satisfied. We are told, that as far as the warrant shows, the party could not discover, from any thing that passed, wherein he had failed; and that in this ignorance he must remain in custody indefinitely, as he has no means of supplying a defect not pointed out to him, or of giving satisfaction upon he knows not what. It is undeniable that the warrant must set forth such specification of questions and answers as shall suffice to show the Court, before whom the matter is brought, what were the grounds of the dissatisfaction felt by the Commis-

sioners ; and that those grounds must be such, that, in the Court's judgment, the Commissioners were well justified in pronouncing the answers unsatisfactory. But it is not correct to say that the Commissioners were bound to point out any particular answer or number of answers as those which failed to satisfy them, or that the warrant should state such particulars. The act 6 Geo. 4, c. 16, s. 39, requires, as did the former act, 5 Geo. 2, c. 30, s. 17, the warrant to specify every question, for not fully answering which the party shall be committed ; with the addition of a power, not given by the former act, to the Court before which he is brought, of looking into all the rest of the examination at the prisoner's desire and for his benefit. But it is nowhere required that the particular questions shall be singled out from among others as having been those unsatisfactorily answered, provided these are all given, so that it may not be necessary to look beyond the warrant for the grounds of the commitment. It is necessary that every part of the examination upon which the Commissioners formed their opinion should be set forth, as was held in *Crowley's Case*, 2 Swanst. 1, and in *Lawrence's Case*, 2 Gl. & Jam. 209 ; and others, as *Price's Case*, *ibid.* 211 ; *Hooton's Case*, *ibid.* 215 ; *Tomlin's Case*, 1 Gl. & Jam. 373 ; and *Coombe's Case*, 2 Rose, 396. But there is no necessity for stating what questions, among the whole set forth as asked, were those with the answers to which the Commissioners were dissatisfied. In *Ex parte Harrison*, in the Court of King's Bench, 1 Barn. & Adol. 410, a very late case, the warrant set forth

the whole examination, which was of great length, as the report states it; and the objection taken was, that it did not specify any of the questions to have reference to the matters into which the Commissioners were authorized to inquire. But the Court was clear, that if, by looking at the whole examination, it appeared to relate to matters within their jurisdiction, this was enough. No objection was taken that the warrant did not specify which of the answers were unsatisfactory; and yet the other point was elaborately supported, and the Court was so clear as to hear only one side. Again, in *Ex parte Vogel*, a long examination is given, as stated in the warrant, and the whole together is made the ground of dissatisfaction; although many of the answers taken by themselves are such as no one could think were not perfectly explicit and direct, and in that sense satisfactory. But the Court held, that the whole must be taken together. Chief Justice Abbott said, "An answer to one particular question may be either satisfactory, or not, according as it bears upon other questions propounded to the witness: and the only way to come to a proper conclusion is to look at all the questions and answers collectively, and to consider them as constituting one entire examination." Mr. Justice Holroyd fully agreed in thinking that we are to take the whole examination together, and see if the answers taken collectively appear unsatisfactory. It is manifest that if such be the rule—and it is the only rational one which can be laid down—there can be, generally speaking, no more specification of the unsatisfactory answers than we

have in the present case. No precedent has been produced of a greater specification of the unsatisfactory answers than by setting forth the examination, and adding, as in this case, that the said answers were not satisfactory to the Commissioners. It is, I believe, the course adopted in all the cases you find reported; and Lord Eldon, in one of them, *Coombe's Case*, observes, suppose a case of an examination in which twenty questions are put, and six answered unsatisfactorily, and the rest satisfactorily, it is still material that the whole twenty questions and answers should appear upon the warrant. This clearly means that the whole twenty are to appear, and the Commissioners are not to draw the line, and to say, six of the answers were satisfactory, and the other fourteen were unsatisfactory.

If, however, it appeared to the Court that the examination taken altogether did not disclose with sufficient distinctness in what respect the Commissioners had been dissatisfied, we need hardly observe that the commitment could not stand; for it would be still less possible to tell from such a record whether their dissatisfaction was well grounded or no. Nevertheless, it will not be sufficient to show, as has been attempted here, that taking some distinct answer of the party by which he negatives the whole charge made against him, and supposing that answer true, the transaction in question fails to affect the bankrupt or the estate under administration, and that consequently there is no authority to commit. Thus, taking the charge to be, in this case, or rather the matter under inquiry to be, a colourable sale, but

a real transfer of the bankrupt's goods to the witness, it is contended, that, because Bardwell swears very distinctly to having bought the goods in question, through a person in his occasional employ, and with his own money, and because if this be true there is an end of any fictitious or fraudulent or colourable transaction, and there has been a real sale, and therefore there is an end of the inquiry as regards this bankruptcy, and the witness could give no other answer, and the Commissioners never can be better satisfied, as long as he continues to speak the truth. Such is the argument. But this is truly begging the question. It is because, upon the whole of his evidence taken together, the Commissioners do not believe him to be speaking the truth in this part of the case, that they are dissatisfied with his answers generally, and commit him. To hold otherwise would in truth be returning to the old principle, long since exploded; but which, if I mistake not, will be found adopted by the Court of King's Bench as late as Lord Mansfield's time, that a distinct swearing must be taken to be satisfactory, provided, if true, it would be so. If it be further urged, as it has been in the present case, that the Court runs a risk of continuing a party's imprisonment indefinitely, when he may all the while be giving a true account, inasmuch as he cannot, without substituting a false account, alter it, the answer is almost too obvious to require being given. All Courts that have to deal with facts must draw inferences from evidence, and run the risk of coming to erroneous conclu-

sions. It is a serious misfortune for the party in such cases to suffer by an error, how honestly soever committed ; and it is a misfortune which every Court that is led into such an error will always feel and regret, as if it had befallen itself. But that is not peculiar to the party committed in the course of such proceedings as these, nor to the tribunals by which these proceedings are conducted. Similar errors, from which no human tribunal is exempt, against which no human precaution can always guard, may lead to still higher penalties, and therefore to greater misfortunes. If such Courts act with due caution, and with a constant feeling of their responsibility, they may, with a safe conscience, deciding upon circumstantial evidence, follow the greater probabilities of the case, where absolute certainty is, from the nature of the thing, unattainable.

Another objection has been taken, and it goes to the examination. It is said that the Commissioners had no right to put the questions touching sales to Shoolbred & Co., by Bardwell ; and that those being unauthorized by the inquiry they were engaged in, were illegal, and vitiate the whole warrant. But I am of opinion that there was nothing illegal in that part of the examination. It was plainly introduced to try the truth of a material part of the witness's story, as to his having no warehouse or place to put the goods in, which he had before said he purchased through Dufton, because he had no such place for them. Nor could the Court possibly tell that this examination was not fit to be pursued as far as it is

carried, without knowing to what points it might be directed; the Commissioners having the power, as was clearly held in *Ex parte Vogel*, already cited, to examine a witness respecting individuals other than the bankrupt, if through them they may be likely to obtain information concerning the bankrupt's estate and dealings. It may perhaps further be observed, that in the same case, Mr. Justice Holroyd said, the witness was then too late in objecting to an irrelevant question, for he should have demurred to it at the time.

But great as is the veneration I feel for every thing that fell from that most able, learned, experienced, and venerable judge, I nevertheless here venture to express my own doubt, whether the question being as to the admissibility in point of law of a question put by a Commissioner to a comparatively ignorant party, ignorant of law no doubt, and who may be unprovided with counsel or even a solicitor at the time,—I venture to doubt—that question, appearing on the face of the warrant, and it being not clear that the answer might not be one of the grounds of the Commissioners being dissatisfied, and therefore the ground of the committal—whether it would not be a sufficient and due time to take an objection to the warrant on that ground, on the habeas corpus being returned, and the return disclosing the illegal question. I venture, with very great deference to that learned judge, to express my doubt—I go no further—whether it would be competent for the Court or the oppo-

site party to contend that you are then too late with your objection, for you ought to have demurred to the question; because the warrant in all particulars must appear to have been supported by that which is set forth on the face of the warrant, and if an illegal question be put, and it do not appear upon that warrant which answer the dissatisfaction arose on, and therefore on what answer the committal was made non constat, it may be said it was not on an answer to that question which the Commissioners put illegally, and which they, by their return as set forth in the warrant, admit to have been one of the questions put, and which they do not sever from the rest. It is possible this may be a misreport of what fell from Mr. Justice Holroyd, but seeing it on the face of the report I could not pass it over.

Were I then only called upon to decide here, whether or not this warrant is sufficient, I should have no doubt; nor have I any difficulty in holding, that the ground of the commitment appears adequately disclosed upon the face of the instrument. The object of the inquiry is clearly to be seen in the questions. It is the witness's having only colourably bought from, and really received for the bankrupt, part of his estate. The reason of the dissatisfaction on the part of the Commissioners with the answers given is equally apparent; and the party could be at no loss to tell what that was. He must have known that they were not satisfied with his account of the transaction, taken as a whole; that they did not be-

lieve his account ; that they considered him as mis-stating some things, and keeping back others ; and that judging by very strong probabilities, such as men daily and hourly put their faith in, rest their conduct on, and are habitually guided by, they disbelieved the greater part of his story, and all of it that was material to the subject of their investigation. If the Commissioners are right in this conclusion, he can have no difficulty in comprehending how he is “ to submit himself to them, and full answer make to their satisfaction ;” that is to say, if he has told what is not true, the way to satisfy the Commissioners will be to tell that which is true ; to give them that true account which they are in quest of. But it is also possible that he may, by stating other circumstances not hitherto disclosed, explain some parts of his evidence at present full of suspicion, and even show that the whole story is consistent and credible, which at present the Commissioners have held it not to be. They will then be satisfied, though in another way. I believe the last bankrupt committed and brought up on habeas corpus, since the act 1 & 2 Will. 4, c. 56, was passed, and who urged much the same argument, on the impossibility of knowing how he was to satisfy the Commissioners, because he had already told all he knew, and told only the truth, did satisfy them on his further examination when again brought before them. I have no very distinct recollection of the matter : but that is the impression on my mind from what I heard at the time.

The question would now arise, whether, upon

carefully examining the evidence, I have come to the same conclusion with the Commissioners, or am of opinion that the story now appearing upon the warrant is such as ought to have satisfied them. But whatever may be my opinion upon this important point—I have not perhaps much concealed it—the view which I take of one part of the proceeding renders it unnecessary that I should explicitly state it in this stage of the question; for I think that there is a fact apparent upon the warrant, which makes it fit that the witness should undergo another examination.

It appears that one Commissioner alone examined him at the two first meetings, and being dissatisfied, committed him provisionally to the messenger. When I look at the story told by the witness in those two examinations, I have no doubt whatever that the learned Commissioner acted correctly in ordering the provisional commitment, and was justified in not being satisfied with the answers given. But when the case was then adjourned to the Subdivision Court, I do not think that that Court sufficiently complied with the provisions of the act by merely taking the examination before a single Commissioner,—putting another question, and asking if the witness abided by his former answers, and abided by them without further explanation, which, it is to be observed, is all that was done by the Subdivision Court. The course of the transaction was thus:—Two long examinations taken by one Commissioner proved unsatisfactory to that one Commissioner; he commits provisionally

to the messenger under the authority of the act which excludes his jurisdiction to commit otherwise than provisionally to the messenger, for the purpose of safe custody, with a view to a further proceeding, and that proceeding expressly not to be before less than three, and that Commissioner himself being one of the three. Such being the provision of the act, he pursued it strictly, and in my opinion most correctly, by taking the first two examinations, and was rightly dissatisfied with the result of those examinations;—right in expressing his dissatisfaction, and in committing to the custody of the messenger. But then the Subdivision Court being assembled merely takes, by way of report from the single Commissioner, the examinations which he had previously taken in the absence of his colleagues, and merely reads these examinations over to the witness, adds one question, and one only, and then asks whether or not he abides by the former answers, and whether or not he wishes to explain any of those former answers. This is all that is done by the Subdivision Court, which immediately says it is dissatisfied and proceeds to commit; and upon that state of facts the question arises, which in my opinion is a very important question of practice. If the single additional question had been such as, taken with the former examination, by which he in the presence of the whole Subdivision Court abided, showed the whole story to be unsatisfactory; if that single question had shown a prevarication, a direct contradiction; if that question had elicited an answer unsatisfactory to all

the preceding questions, which they might have compressed into their single question; if that had been unsatisfactory,—then the proceeding might have been regular, because, strictly speaking, the opinion of the three Commissioners would have been formed on what had passed before themselves, and on that only, (*Atkinson's Case*, 2 Gl. & Jam. 218.) But in fact their judgment was formed upon the answers given in their absence to questions put in their absence, and all they knew was, that he acknowledged having been asked those questions, and having given those answers.

It appears to me that the statute intended to give the party under examination the security of three judges being present, presiding over his examination, and forming their opinion upon hearing and seeing him answer the questions put. If it be only conceivable that they *might* have come to a different conclusion by being personally present, from that to which the reading of the deposition led them, it is enough, provided that difference *might* have been in favour of the party. Nothing, indeed, in the manner of his deposition, could be a ground for concluding against him; because the record of his examination must contain enough to show that he was deservedly committed, and if the written testimony proves nothing against him, his manner of personally giving it is quite immaterial. But it is enough to show the difference between the whole Subdivision Court assisting at the examination, and one Commissioner taking it in the absence of the other

two, who only hear the witness acknowledge it, that there *might* be something in the manner of his deposition which would have affected the belief of the other two, had they seen him examined. The provision of the act appears to be intended to give him the benefit of such a possibility. But further, had these two Commissioners been present, it is also possible that some questions might have been suggested by the colleagues of the single Commissioner, which would have drawn forth answers favourable to the witness. Of that possibility also, the act seems to intend to give him the advantage. It is true, the 7th section, upon which I think this construction ought to be imposed, does not explicitly direct the examination to be recommenced by the Subdivision Court, and it uses the word "adjourned" in a way that has possibly introduced the practice of only continuing the further examination before the three, beginning where the single Commissioner had left off. The party is to be brought up within three days before the Subdivision Court, "to which such examination shall be adjourned." This, and the consideration that in almost every case the reading over of the former examination, and giving the party full opportunity of retracting or altering or explaining it, has probably appeared sufficient to satisfy the exigency of the statute, and to make the difference which I have pointed out appear so inconsiderable, that it rather seemed formal, than of the substance. That I take to be the origin of the practice. Nor should I, upon the other

provisions of the statute, have been disposed to put so large a construction, or to correct any practice that might have grown up, or rather begun to take root, under a more literal interpretation of the words. But where the matter in question is the power of commitment, it behoves us to enlarge whatever tends to throw guards around the liberty of the subject, and to take most strictly whatever confers the authority to imprison. That is the ordinary and sound rule of construction. The 7th section expressly prohibits one judge from committing; and although it does not say in terms, that the whole inquiry shall be conducted by all who concur in pronouncing the sentence, yet I think, that, in soundness of construction, it must be held to mean, that they alone who have the authority to make the order, shall all join in the inquiry out of which that order is to spring, and not rest satisfied with taking from one of their number the report of an inquiry conducted by him before they were called in, and then, as it were, adhibiting their authority to give his opinion legal effect. It must be *their* order as well as *his*, in substance as well as in form.

I consider that this is sufficient, upon the present occasion, to vitiate the commitment. Undoubtedly I am empowered, where a warrant is bad for the form, to remand, if upon the merits the prisoner appears to have been properly committed. But I do not consider this a defect of such a kind as ought to be thus supplied; and I find that in a case, *Ex parte Cassidy*, 2 Rose,

217, Lord Eldon,—having a doubt passing over his mind, whether he had a right (the words of the act empowering and requiring to commit, if the Court shall think there be an error in form, but yet that the party in substance appeared to be rightly committed) to neglect that power which was given,—considered what the nature of the objection was; and being of opinion that it was a flaw, but more important than could have been contemplated by the legislature when they passed this act, his Lordship discharged the prisoner, although that was perhaps more near a formal objection than the objection I now take to the present commitment. I have therefore no doubt that I am not called upon to exercise, and I shall not exercise, the power of keeping the prisoner in custody. I shall discharge the prisoner on this ground, and on this ground alone, desiring it to be most distinctly understood, that it is on this ground, and on this ground alone, that I order him to be discharged.

BIRKETT *v.* HIBBERT.

LORD CHANCELLOR.—This was an application against the Master's report, approving a settlement to be made of the fortune of a ward of Court, who had been married by a young man of no property, clerk in a solicitor's office, and in circumstances which appeared to the Master to call for more than ordinary strictness, for the purpose of excluding the husband from reaping any bene-

Feb. 24, 1834.

Form of settlement to be made in the case of a marriage with a female ward of the Court under aggravated circumstances.

fit from the wrong he had committed. The settlement approved of is on the wife for life, and afterwards to the issue of this or of any future marriage, and for default of such issue to her next of kin. The Master has also refused to allow any trustee on the husband's behalf.

It is contended on the husband's part, that even in cases of great aggravation, no such settlement has ever been sanctioned by the Court, and that this is one unattended with any aggravating circumstances. To the latter observation I cannot accede. It is a case of very considerable aggravation ; and when the conduct both of the husband and his family is regarded, the strongest disposition naturally arises to save the property of this young person from falling into their hands. And as far as the principle upon which alone the Court can act in a case of this kind will permit, and as far as precedents have gone, this precaution is fit to be taken. But the settlement which the Master has approved, reduces the ward to a mere tenant for life, as if her fortune had come to her in strict settlement ; and while it deprives her of all power to appoint any thing to her husband, it takes the reversion from herself,—that is to say, for the purpose of preventing him ever benefitting by the property in any conceivable event, the settlement deprives her of all power to benefit any one of her relations, should her issue fail, although she has illegitimate brothers and sisters, who are excluded, while her next of kin are made wholly independent of her bounty. I cannot go so far. I

find no precedent of the kind. On the contrary, the cases, which are some of them much more aggravated, furnish no example of such a settlement; and some of them are as bad as can be well imagined, both from inequality of alliance and gross misconduct. Thus, in *Bathurst v. Murray*, 8 Ves. 74, a female of very considerable fortune, and only 16 years of age, had been inveigled into a marriage with a young man of inferior condition, by means of a combination of his family and the family of his master. The marriage too was found to be void by the law of Guernsey, where it was had, and the Court directed it to be solemnized again. In this case, although the husband's conduct was such that the Court kept him a year in custody, and would not discharge him on executing the settlement, yet the wife's power of appointing, on default of issue, was not taken away, and Lord Eldon gave her also a power of appointing to him to a certain amount by will, while he was to have an allowance during the coverture, upon the ground that making him wholly dependent on his wife, and exposing him to run in debt, would be hurtful to the comfort of both parties. *Millet v. Rowse*, 7 Ves. 419, was a case of the most flagrant description, where the ward was only fourteen, and the marriage being by licence, the husband had committed perjury to obtain it, had been prosecuted and convicted, and had suffered imprisonment and the pillory. In so profligate a case the Court was disposed to go as far as possible against the husband, and Lord Eldon plainly was resolved to do so, for

he says, "the only settlement I ever will approve is this." But though he orders the fund to stand in the name of the Accountant-General, and that the income shall be paid to the separate use of the wife, from time to time, and not by way of anticipation, yet, after settling the fund on children, he allowed it, if the husband survived her and there was no issue, to go according to her appointment, and only in default of appointment to her next of kin. "In case" (said his lordship) "he redeems himself by good conduct during her life, she may give it to him by her will. If she does not, I never will let him touch a farthing of it."

By the settlement before me, not only is this husband excluded, but any future husband; nay, more, if the present husband dies the day after the settlement is executed, the wife has no power whatever over the property, although the whole reason for the restraint has ceased. It appears to me that this proceeds upon an entire mistake of the province and duty of the Court in dealing with the property of the ward. The ward's interest is to be consulted in the settlement, and that alone, unless the other and subordinate purpose of precaution against the husband can be accomplished without any prejudice to the ward. Where her interest would suffer, the punishment of the husband, or the restraining of him from seeking an advantage, is not to be regarded in settling the wife's estate. Whatever tends most to her advantage must be pursued, though it may tend eventually to benefit the principal wrong-

doer. How can I tie up this young person's property for ever, and reduce her to the situation of a mere tenant for life, taking out of her the absolute interest, which she now has, and giving it in default of issue to persons who are really strangers—the next of kin; and all in order to punish the husband, or at least to show him that he shall not profit by his misconduct? It cannot be thought of.

The settlement upon the children of the marriage may stand, but with a power to her of appointment in default of issue of this first marriage; such power to be exercised by will only, so that she may not be gotten to execute any other instrument in her husband's favour. In case of her death without issue, and without making a will, then the property shall go to her next of kin. In case of her husband's pre-deceasing her, and there being no issue of the marriage, then she may make what settlement or other disposition of her property she pleases. But in case of her marrying a second time, having issue of the first marriage, I think she ought to have the power given by the settlement in *Bathurst v. Murray*, which Lord Eldon very carefully considered; and it was a power to give each child of the second marriage a sum not exceeding that which the children of the first severally had.

This motion must be at the cost of the husband.

HUNTER *v.* ATKINS.

THE deed which it was sought by this suit to set aside was made in favour of Alderman Atkins and his son. All the remaining circumstances that it is at all material for the reader to know may be gathered from the judgment.

Feb. 24, 1834.

In transactions where one party stood in such relation to the other party as guardian, attorney, trustee, &c. the proof that no advantage was taken of that relation lies upon the former; but it is not necessary for the validity of the transaction that it should have been effected by the interposition of a third person.

Where the relation between the parties was only that of friendship, the one however habitually relying upon the other for advice, employing him in some sort of business, &c., it is for those who impugn the transaction to prove that an undue advantage was taken of the influence arising out of this relation.

LORD CHANCELLOR.—This cause has excited considerable interest, and not unnaturally, from the peculiarity of circumstances and of characters in which it abounds, as well as the important stake which it involves, not indeed on account of the amount of property in question—for that is inconsiderable—but because the reputation of parties in a respectable condition of life, and hitherto unimpeached, is to a certain degree implicated in the result. The case of the plaintiffs cannot be supported without a decision unfavourable to the character of both Mr. Alderman Atkins, and the late Mr. Roberts, his solicitor; a decision imputing to the former, conduct in the extreme grasping, indelicate, nay in some degree dishonourable, if not positively dishonest; and to the latter, a share in the unworthy contrivances of his client, and a lending himself to his sordid designs. Every man has a right to demand that before he is believed capable of such things, his life should be examined; thus much is due to him from the society in which he lives. But with such general inquiries Courts of

Justice have no concern. From them he has a right to demand that he shall be charged with specific breaches of duty, or deviations from the line of good conduct; that he shall not be put upon his defence upon vague suggestions; and that he shall not be assumed to have swerved from the right path without sufficient and positive proof. One man will display more delicacy than another; a chivalrous regard for the situation of their neighbours will mark the conduct of some; and some may show themselves regardless of their own interests in circumstances where they could, without incurring any blame, gain a benefit, not so much at the expense of other people as by taking their place in the bountiful intentions of a common friend. With all this Courts of Justice have nothing to do; they can no more set aside a gift from Admiral Hunter to the Alderman, because it would have been generous or delicate in him to have insisted that his friend should prefer his wife or his adopted daughter, than they can decree him to give up the sum which his friend bestowed upon him, for the support of those whom he postponed in the disposition of his property. Unless the circumstances of the transaction are such as make it void, upon the ground of fraud or undue influence, the right is incontrovertible, and the Court cannot interfere. The various departments of its jurisdiction are not in any portion accurately defined; all the lines within its province are not precisely drawn; but at least its outer boundary is sufficiently marked, and separates it plainly enough from the province of the moralist, from

the regions under the sway of what are not very accurately termed, the duties of imperfect obligation.

There is no dispute upon the rules which, generally speaking, regulate cases of this description. Mr. Alderman Atkins is either to be regarded in the light of a person confidentially entrusted with the management of Admiral Hunter's concerns—a person, at least, in whom he reposed a very special confidence—or he is not. If he is not to be so regarded, then a deed of gift or other disposition of property in his favour must stand good, unless some direct fraud has been practised upon the maker of it; unless some fraud, either by misrepresentation or by suppression of facts, misled him, or unless he was of unsound mind when the deed was made. If the Alderman did stand in the confidential relation towards him that I have alluded to, then the party seeking to set aside the deed may not be called upon to show direct fraud; but it is incumbent upon him to satisfy the Court by the circumstances that some advantage was taken of the confidential relation in which the Alderman stood. The onus probandi lies upon him. If indeed the Alderman stood in any of the known relations, of guardian and ward, attorney and client, trustee, and cestui que trust, &c., then, in order to support the deed, it is for him to show, on the other hand, that no such advantage was taken—that all was fair—that he received the bounty freely, and knowingly on the giver's part, and as a stranger might have partaken of it. For I take the rule to be this: There

Justice have no concern. From them he has a right to demand that he shall be charged with specific breaches of duty, or deviations from the line of good conduct; that he shall not be put upon his defence upon vague suggestions; and that he shall not be assumed to have swerved from the right path without sufficient and positive proof. One man will display more delicacy than another; a chivalrous regard for the situation of their neighbours will mark the conduct of some; and some may show themselves regardless of their own interests in circumstances where they could, without incurring any blame, gain a benefit, not so much at the expense of other people as by taking their place in the bountiful intentions of a common friend. With all this Courts of Justice have nothing to do; they can no more set aside a gift from Admiral Hunter to the Alderman, because it would have been generous or delicate in him to have insisted that his friend should prefer his wife or his adopted daughter, than they can decree him to give up the sum which his friend bestowed upon him, for the support of those whom he postponed in the disposition of his property. Unless the circumstances of the transaction are such as make it void, upon the ground of fraud or undue influence, the right is incontrovertible, and the Court cannot interfere. The various departments of its jurisdiction are not in any portion accurately defined; all the lines within its province are not precisely drawn; but at least its outer boundary is sufficiently marked, and separates it plainly enough from the province of the moralist, from

others and advantageous to himself. In a word, standing in the relation in which he stands to the other party, the proof lies upon him, (instead of lying, as it would do, in the case of a stranger, on those who oppose him,) that he has placed himself in the position of a stranger; that he has cut off, as it were, the connection which bound him to the party giving or contracting; and that nothing has happened which might not have happened had no such connection subsisted. The authorities mean nothing else than what I have stated when they say, as in *Gibson v. Jeyes*, 6 Ves. 266, that attorney and client may deal, but that it must be at arm's length, the attorney putting himself in the situation of purchaser towards seller; and the parties performing (as the Court said, and I take leave to observe, not very felicitously or even very correctly said) all the duties of those characters. The authorities mean no more, taken fairly and candidly towards the Court, when they say, as in *Hatch v. Hatch*, 9 Ves. 292, that it is almost impossible in the course of the connection of attorney and client, that a transaction shall stand purporting to be bounty, or as in *Wright v. Proud*, 13 Ves. 136, that an attorney shall not take a gift from his client, though no fraud appears, and the proceeding is most moral in its nature: for in *Harris v. Tremeneere*, 15 Ves. 34, the Court only held, that in such a case a suspicion attaches on the transaction and calls for and justifies a very minute examination. This appears to me a much more intelligible and sound principle than the one to which reference is

made by the Master of the Rolls in his judgment—and which in cases of this description you will sometimes see alluded to—that a third person ought to be interposed. I say you will see it alluded to, for I can no where find it established as the rule. Even in *Griffiths v. Robins*, 3 Madd. 191, to which his Honor refers, as the ground of his present decision, and which was heard before the same learned judge, it is not so laid down. That was the case of an ancient female, stricken with blindness or nearly so, and reduced by her age and her infirmities to a condition of entire dependence upon her niece; the niece was married, and it was to her and her husband that the gift was made, and the Vice-Chancellor (the present Master of the Rolls) held that they were bound to show that it was the result of her own free will, and effected by the intervention of some indifferent person. But it is quite clear that he mentions this as one obvious test or criterion of that for which we are seeking in all these cases—namely, the proof of a voluntary and deliberate act—and not as the only way in which the deed can be shown to be of that description. No man, for instance, can doubt, that if letters had been produced written by the old woman for a course of time and without any interference at all, or conversations had been proved in which her deliberate intention had been expressed under no agency of influence or deception, the gift would have been good. To hold the contrary would be to say, that the law will not allow a person dependent on the kindness of others for her

comfortable existence, to show her gratitude towards them in the disposal of her property; in other words, it would be to deprive such a person of a power over her property whom it most of all imports to possess and to use that power of disposal. In no other case has any thing of this kind ever been laid down. I am of opinion that it is not laid down in *Griffiths v. Robins*, unless you take the letter of the judgment against its plain meaning. But in no other case that I know of can any such thing even be supposed. Thus, in *Harris v. Tremenheere*, already cited, where a person unacquainted with business, an invalid and incapable of attending to his affairs, granted to an attorney, who was distantly related to him, (son of his grandfather's cousin,) and was his own steward, as he had been his father's, several leases for long terms at nominal rents; it was strongly contended that this attorney and steward ought to prove that he had explained to the client what he was doing, and to have had a third person interposed; but the Court said, that there was no authority for holding, he could not take such leases as a pure gift from his employer. "If," said Lord Eldon, "I could find in the answer or evidence the slightest hint that the defendant had laid before the testator any account of the value of the premises that was not perfectly accurate, that would induce me to set them (the leases) aside, whatever the parties intended, upon the general ground that the principal never would be safe if the agent could take a gift from him upon a representation that was not most accurate

and precise." Lord Eldon remarks in another part of the same case, that where an attorney, agent or steward, takes leases, without calling in a third person, not that the leases are void, but only that a suspicion attaches on the transaction, justifies a thorough examination, and prevents the Court from giving costs should the result of examination prove favourable and the transaction stand. Nothing, it is manifest, can be more wide than this, of a rule that a third person must at all events be interposed, and that this is the only criterion of a fair transaction between parties so related to one another.

I have referred to the case of agent, attorney, or steward, as the strongest—as the one to which the jealousy of the Court is at all times the most watchfully awake—and as the one in which I believe alone, except in *Griffiths v. Robins*, you will find the interposition of third parties mentioned, to the effect of holding the want of such interposition a sufficient ground for setting aside the transaction. Where the relation in which the parties stand to each other is of a kind less known and definite, the jealousy is diminished. A confidential adviser, one who has been generally consulted in the management of the person's affairs, though he may have also been employed specially in his business, does not lie under the same suspicion with an attorney or a steward, or any one who has a general management. In *Pratt v. Barker*, 1 Sim. 1, the object of bounty was one who had been employed for many years as the surgeon and apothecary of the donor, had received his divi-

dends for him, and had oftentimes been consulted by him respecting the management of his property. Through him the instructions to frame the deed were conveyed to the donor's solicitor, who so far deviated from these instructions as to leave a blank for the donee's name, till he saw his client; and because it was proved that the donor understood the nature of the gift and had the deed read over and explained to him, the Court refused, and without hesitation or even hearing the defendant, to set it aside. In the famous case of *Huguenin v. Basely*, 14 Ves. 273, remarkable among other things for the display of those transcendent talents, and that pure taste, by which among many far higher accomplishments Sir S. Romilly elevated and adorned the bar, there was a great and general influence exercised of a peculiar kind. It led to the giving up of the whole direction of the party's concerns into the defendant's hands, even to the delivering over of her title deeds by her solicitor. It ended in a conveyance of an estate without consideration; and yet the Court held, that the proper inquiry was,—were her bounties the pure, voluntary, well understood acts of her mind? Did she execute the deeds not only voluntarily but with all the knowledge of their effect, nature, and consequences which the defendants Basely and the attorney were bound by their duty to communicate to her?

The rule, I think, cannot be laid down much more precisely than I have stated it—that where the known and defined relation of attorney and client, guardian and ward, trustee and cestui que

trust, exists, the conduct of the party benefited must be such as to sever the connection, and to place him in the same circumstances in which a mere stranger would have stood, giving him no advantage, save only whatever kindness or favour may have arisen out of the connection; and that where the only relation between the parties is that of friendly habits or habitual reliance on advice and assistance, accompanied with partial employment in doing some sort of business, care must be taken that no undue advantage shall be made of the influence thus acquired. The limits of natural and often unavoidable kindness with its effects, and of undue influence exercised or unfair advantage taken, cannot be more rigorously defined. Nor is it perhaps advisable that any strict rule should be laid down, any precise line drawn. If it were stated that certain acts should be the only tests of undue influence, or that certain things should be required in order to rebut the presumption of it, such as the calling in a third person, how easy would it be for cunning men to avoid the one or protect themselves by means of the other, and so to place their misdeeds beyond the denunciations of the law, and secure the fruits of them out of its reach! If any one should say that a rule is thus recognized which from its vagueness cannot be obeyed, because it cannot well be discerned, the answer is at hand. All men have the interpreter of it within their own breasts; they know the extent of their influence, and are conscious whether or not they have taken advantage of it in a way which they would feel indignant,

that others similarly circumstanced should do with regard to themselves.

The circumstances of each case, therefore, are to be carefully examined and weighed—the general rule being of a kind necessarily so little capable of exact definition; and on the result of the inquiry, we are to say, has or not an undue influence been exerted—an undue advantage taken?

We may first of all observe upon the facts of the present case, that the Alderman had the confidence of Admiral Hunter to a *certain* degree, and was accustomed to advise him in *certain* matters. He had been in habits of intercourse with him both in society and business for many years, and he was employed as his agent and banker, that is, he acted professionally as his navy agent, received and paid away his money,—answering his drafts,—and was naturally consulted by him in his money matters from the acquaintance he had with such transactions. That he was consulted by him beyond this in the disposition of his property no where appears. Many men of business advise their customers or friends as to buying and selling stock, and otherwise dealing with their funds, who would be surprised at being asked how their testamentary dispositions ought to be made; and the habit of consulting upon even all the details of a man's money transactions would be very far indeed from entitling any banker or agent to give the least hint as to such arrangements.

The two individuals, however, had, beside the

intercourse of acquaintance and business, been united in very strict friendship for a period of forty years. Their ages were widely different, but they had been shipmates in former times, and the correspondence, as well as all the evidence, shows, that there was no one for whom the veteran seaman had so great a regard as his ancient friend and comrade. If this bond may be said to have increased the Alderman's means of influencing him, it opens, on the other hand, a source of kindness and preference altogether legitimate and pure. Indeed, this consideration goes further; it materially lessens the weight of any remark that might arise upon the exercise of influence acquired by confidential employment; and further still, it even impairs the force of any inference to be drawn from the other relations, in which the parties stood towards each other, in proof of the fact, that such influence had been used; for it affords an explanation of the favour shown, without having recourse to the supposition, that the knowing or crafty counsellor had practised upon the less wary client.

That the Admiral had all along the feelings of kindness for Alderman Atkins, to which I have alluded, there is abundant evidence. Some of this is to be found in the circumstances attending the "factum," (as they call it in Doctors' Commons,) other part relates to the general habits and expressions at former times; and a further part to the still warmer expressions of regard after the deed in question was executed. It appears—and nothing can be more important to the whole discussion,—

that many years before, as early as Oct. 23, 1811, he had been minded to make an instrument of some kind to enable the Alderman to act in furtherance of his wishes. He says, "I want you to make a deed or will to enable you and yours to act for me hereafter," (he had expressed his satisfaction in a former letter, January 23, 1811, that Mr. Atkins, jun. the other defendant and trustee in the deed, was become a partner with his father,) "having every confidence in you to execute my further wishes." But he goes on to give some reason, not very distinctly, but yet plainly enough, pointing to Mrs. Hunter as likely to be provided for by her father, "she will have something from him (meaning her father) when he is no more—he will not part with anything yet a while, therefore must take care of self, particularly as we are not likely to have any children." I own it seems difficult to put any meaning upon this, other than as indicating an intention, though not very precise, as to the direction which his bounty should take, yet of pointing it away from Mrs. Hunter. From a letter of the Alderman in 1812, it appears that a will had been made and deposited with him, in which he was mentioned in some way. From another in the same month, it is clear that the Admiral kept his wife in ignorance of the state of his affairs, with the view of enforcing strict economy; and a subsequent letter shows, that he resorted to a somewhat elaborate artifice with the same design of concealing from her the amount of his property. A letter of the Alderman to the Admiral in July, 1817, plainly

shows two very important particulars, first, that a will had been made in the Alderman's favour; and next, that the Alderman desired his friend, in the most distinct terms, to make what change he pleased in the disposition of his affairs in favour of his wife, and without regarding his (the Alderman's) interest, or any thing already done to favour him. "If you have a wish to make any alteration in your will in favour of Mrs. Hunter, pray do so without regard to me personally, or to any paper I may hold of yours; pray, my dear friend, make a new will entirely in any way your mind dictates, and be assured it will be pleasing to me; and in whatever way I can be useful to you, consider me, without any personal interest." It is only fair to observe upon this letter, that one cannot easily see any thing stronger which the Alderman could have done to release his friend, or put him at his ease with respect to the disposition of his property. Had he gone further and declared, that nothing should induce him to profit at the expense of the widow, he might have been charged with hypocrisy, and assuredly, with a man of the Admiral's turn of mind, the widow would have gained little by the refusal. It is said, that these letters show a will or wills to have been in the Alderman's possession, and the question is asked, "why has he not produced them?" But the letter of July, 1817, to which I have referred, begins with stating, that the Alderman had searched and could not find his friend's papers, and that Mr. Jackson, who appears to have had the care of them, was in France. No one can

doubt that they were returned when found, and if not, that they would, when produced, have proved to be in Mr. Atkins's favour.

We approach the period then of the factum, with these things established—long and intimate friendship and much favour towards the Alderman—a careful concealment of the Admiral's affairs from his wife—a disposition of his property, in part, at least, unfavourable to her, and favourable to the Alderman—all this continuing during twelve years previous to the period in question, and all this proved, not by witnesses, but by letters under the hand of the Admiral himself, or addressed to and received by him. I will observe on this correspondence in passing, that it wears a natural air enough, on the Alderman's part, and that his letters are sufficiently like those of a person in a great concern of business, who, knowing his friend had left him something of no great amount, was neither very anxious to take it, nor very desirous to go out of his way, in order affectedly to reject it. It is fit that we now step aside, before coming to the factum, and mark the state of the Admiral's mind.

The bill sets forth, that he (the Admiral) was, ever since an engagement in which he had been nearly hit by a cannon-ball, subject to temporary fits of mental derangement—that these increased in frequency and violence during the last twelve years of his life, from 1818 to 1830—that they rendered him, while they lasted, of perfectly unsound mind, and wholly incapable of managing his affairs—that he was seized with one of them in the beginning

of July, 1823, (the deed in question being executed on the eleventh of that month,) and that the defendant, with the aid of Mr. Roberts, his solicitor, caused him to execute the deed while he was of such imbecile mind and intellects as to be nearly childish, and was wholly incapable of managing his affairs, or understanding the nature or purport of any deed—and that, at the time of the execution, he was also labouring under the influence of the fit of temporary derangement which seized him early in July. It is not often that a case stated in a bill wears an aspect so widely different from that opened by counsel at the bar, or that a case opened by counsel is so wholly unsupported by the evidence, as the case I have now abstracted from this bill differs from that presented to the Court at the bar, and proved by the evidence in the cause. This wide discrepancy—this large departure—is not to be stated as decisive against the plaintiff, but is to be mentioned as a circumstance to the benefit of which the defendant is entitled, and a circumstance of which, I must observe, he has had no benefit in the Court below, any more than he had of the important circumstances proved by the correspondence, and to which I have already adverted.

At what period the plaintiffs were advised to shift their ground so entirely we can only conjecture. That they examined witnesses, with the expectation of proving some such case as their bill states, is manifest enough. But when publication had passed, and they saw how their proof had failed—in some points going beyond all proba-

bility, and so, in that way, failing in other points—and how it had been rebutted by adverse testimony in most respects, they possibly deemed it advisable to abandon the ground of mental incapacity, or rather the somewhat incongruous ground of combined insanity and imbecility, which forms the basis of their bill, and to take the points upon which alone they now rely, and to meet which they did not think proper to direct the attention of the defendants.

The evidence, however, of mental incapacity was given to support the case in the bill, and it partakes largely of the inconsistencies of that case. The principal witness to it is Miss E. Hunter, who stands as nearly as may be in the relation of a party, being the adopted child of the aged pair, and next to the survivor, the person who may be supposed most disappointed by a third of the personalty being given away to the defendant. She swears to the Admiral being subject to delusions, to insanity, and to fits of violence, requiring strong control; but she also says, that he was in a state of mental imbecility;—all which is not very intelligible in any way, but must, I suppose, be taken to mean that he had fits of insanity, and, during their intervals, sunk into an imbecile state. Spring and fall are the seasons at which she represents him as most subject to aberrations, and neither was the time in question. During the whole of May, June, and July, 1823, she describes him labouring under a fit of mental delusion, and also in an imbecile state (for she always mixes these things together) that rendered

him wholly incapable to transact any business, or take care of himself; and she adds, that his state of mind was apparent and visible, and manifested as strongly as possible by his manner, conduct, and countenance. This is stated for the purpose of proving that the Alderman must have been aware of it; but by showing that all others who saw him must also have perceived it, the mark is overshot, and the evidence of those others is let in to contradict it. For Miss Hunter swears that it was impossible for any person of competent understanding and discernment, who had conversed with the Admiral in July, 1823, to have been ignorant of the state he was in.

Now, many witnesses are produced on the part of the defendant, who had intercourse with the Admiral during that month of July. Mr. Rice and his wife, who happened to be introduced to him for the first time on the 10th July, 1823, and passed that evening and the next with him, and refer for the dates to a journal of occurrences, swear, that he was fully competent in every respect; that he played at cards, and conversed as rationally as any person in company; and that, though he was evidently old (being indeed turned of ninety-one), his faculties seemed quite fresh and vigorous. The servants (Gow and Johnston), who attended him at Mr. Macduffie's house, where he was on a visit in the same month, and the guests who met him there at dinner, some of whom, as Mr. Gray, dined with him on the 10th of July, and were in the habit of seeing him both before and after, speak distinctly to his entire capacity; and the defend-

ant's clerks, Lane, Blacklock, and Hollyer, all are positive witnesses to his transacting business with perfect competency, and to his coming alone for the purpose, in the same month. I pass over the more general evidence of capacity, almost equally inconsistent with the case of the bill and the testimony of Miss Hunter, who must, at the very least, be admitted to have mistaken either the year or the month, if she is not in an error upon the whole subject-matter. The statement of Miss Hunter, that, for all the last five years, and, at times, during six years before, he was incapable of knowing the value of money, is not at all decisive, were it true; but it is contradicted.

With a case of general insanity or incapacity wholly breaking down, and with a case of such insanity or incapacity, if confined to the month in question, failing as signally, we come to the transaction itself on the 10th and 11th of July—the days which Mr. Rice and his wife and Mr. Gray passed in his society, and who must have sworn falsely, without any motive, if the Admiral's state of mind even resembled, however remotely, that which the bill and one of its witnesses represent. That the Admiral was left in town behind Mrs. and Miss Hunter, and that they could not prevail on him to accompany them, is true. But I think it is equally clear, that, if they had believed him to be in the state of actual insanity described by Miss Hunter, they would not, on any account, have left him to the care of a servant, which turns out to have been his own care, for he went alone to Walbrook. It is equally true that from

thence he went with Mr. Jackson, the Alderman's clerk, to Mr. Roberts's, and that this was the professional adviser whom he employed, on the Alderman's recommendation, in preparing the deed which was to dispose of part of his property, and the will which was to dispose of the rest. If another solicitor had been employed,—possibly if Mr. Roberts had taken the precaution of preserving, instead of losing or destroying, the instructions he took down in writing from the Admiral's mouth,—this case would never have come into Court. But the question is, whether that untoward circumstance is sufficient to make this whole proceeding invalid to effect what seems plainly to have been the fixed purpose of the Admiral. Let us look to the other circumstances attending it, and see if they increase or remove the suspicion which arises from the one I have adverted to.

Mr. Jackson, who went with the Admiral from Walbrook to Ely Place, is no longer in the Alderman's employ—has quitted it seven years since, three before the Admiral's death, and four before this suit commenced. He was a clerk in the house for eighteen years, and had known the Admiral during all that time. He swears, that the Admiral, on the way to Roberts's, said, that he was going to give between the Alderman and others a sum of money or stock, purchased with the accumulations of his long annuities, and that the purpose of his going to Ely Place was to have a deed prepared with this view. When they arrived, he says, that the Admiral gave instructions

to Roberts, who sketched a draft accordingly, and read it to him, and that he approved of it, but changed his mind while it was preparing, and made an alteration, by leaving some person's name out whom he had intended to give a small sum of money to. He also swears, that the deed produced is according to the instructions given, and that he was not surprised at the Admiral giving Alderman Atkins part of his money, because he had seen letters from him, in which such an intention was expressed. That the Admiral could be supposed by any one incompetent to manage his affairs, appears to this witness wholly inconceivable, from the many opportunities he had of intercourse with him on his business concerns.

Mr. Roberts swears distinctly, not only to the Admiral's competency, but to his own belief, that he was not persuaded or influenced by any person or persons whatsoever, but acted in respect of the deed from his own voluntary inclination and free will, and that it was his own act and deed—that the instructions proceeded entirely from himself—and that, when he first mentioned his intention in the Alderman's favour, he, Roberts, rather endeavoured to dissuade him, stating that Mr. Atkins was a rich man, and did not want it; but the Admiral answered, that he was under great obligations to him, had a great regard for him, and had determined on doing it. When the deed was prepared on the 10th July, Mr. Roberts gave him a sketch or short abstract of it, which he took away with him; and on that day he was in the society of other friends, wholly apart from the

Alderman, namely, Mr. Macduffie's family, to whom he has only left 30/. On the 11th he returned to Ely Place, when Mr. Roberts read the deed over to him, and explained its nature and purport before he executed it. Mr. Roberts also positively swears, that he did not see either the Alderman or his son before execution, and that he had no conversation whatever with them, directly or indirectly, upon the subject.

Between the accounts given of the transaction by Roberts and Jackson, there are only such immaterial variations as are almost always found in the stories told by different persons of the same transaction, when they are telling the truth, and in no concert to deceive by making their recollections exactly agree. This, indeed, is generally deemed a test of honest evidence, and I have always observed that the most experienced judges rely upon it as such. Thus, Jackson does not mention Roberts's dissuading the Admiral, which, had he been making a tale for his old master, in concert with Roberts swearing for his client, he might easily have done; Roberts's answer to the bill having of course been sworn before Jackson was examined, and having given a similar account of his conversation. So, Jackson being described by Roberts as having joined in dissuading the Admiral, Jackson gives no such particular. Nevertheless he confirms Roberts's account of those attempts to dissuade, for Roberts says that in answer to his remark that the Alderman was a rich man, and did not want it, the Admiral said he was under great obligation to him; and Jackson, to show why he

was not surprised at the gift, uses nearly the same expressions.

When we consider the slender interest which either of these witnesses can be supposed to take in this matter—that the one was only acting for a client, and the other only giving testimony for an employer whom for five years he had ceased to serve—we must admit, that were we to believe them perjured upon mere suspicion, uncontradicted as they are by any one, and generally confirmed in such respects as they could be by the oath of the defendant, we should be shaking the confidence reposed in the greater part of the testimony by which the memory of men's transactions is preserved. But if Roberts and Jackson are believed, we must admit that the Admiral, in the entire possession of his faculties, and with a full capacity to manage his affairs and dispose of his property, had formed the deliberate intention of executing this deed in favour of a friend, towards whom he entertained extraordinary esteem and gratitude ; that he well understood what he was doing ; that the deed was prepared from his own express instructions, and read over to him on one day ; that he was furnished with an abstract, or summary, which he carried home with him ; that he returned on the morrow, when it was read over and explained to him ; and that he then executed it in the presence of two other witnesses, clerks of the professional man. Can any influence which the Alderman may be supposed to have possessed over him invalidate such a deed, without a tittle of reason, beyond

what is derived from the fact itself of its effect being to give a preference over near connections, and from the relation of navy agent and the habits of friendship that subsisted between them—those habits furnishing at the same time an explanation of the favour and affection shown, without having recourse to any supposition of undue practices? But if on such grounds a deed so prepared and so executed is to be set aside, there assuredly are few of the acts of men in dealing with their own affairs safe, and the law which enables all who are of sound mind to dispose of their property, no longer exists but in name.

That the Admiral was not perfectly acquainted at the time with the nature of the transaction in question, is incredible, unless Roberts and Jackson have forsworn themselves; and any evidence tendered to prove him at a subsequent period ignorant of what he had done, would be extremely inconclusive, even after a short time had elapsed; because his memory, at so advanced an age, might have failed during the interval. But the proof, as far as it goes, is, upon the balance, the other way. Five days after the execution of the deed and the making of the will, he writes to the Alderman a letter of much kindness, in which, after saying that he had called to take leave of him, perhaps for ever, he observes, that in his will, left, he says, with the Alderman, there was a mistake in giving Mr. Macduffie 30*l.* instead of 100*l.*, which he ought to have done from the kindness and gratitude he bore towards his father. The instrument certainly contained a bequest of 30*l.* to that gentleman. In

September following he writes to the Alderman another letter full of affectionate kindness, and observes that he was not quite satisfied with his Will, having had "gout both in his head and his heels at the time, and not well recollecting how it was finished." The Alderman supposing he meant his Will, though it is contended he used that word to describe the deed, says in reply, that it is at Roberts's, and he hopes he will make whatever alterations he likes in it, without regard to any one—reminding him that he had always desired him to consult his own inclinations alone—in short, using the same language he had employed on the same subject in 1817. The letter mentioning the will is dated 12th September, 1823, at Yarmouth; and on the 15th and 16th it is proved by Roberts that the Admiral was in Walbrook, and sent for him in order to read over the deed and will; so that if he had, as the letter imports, at all forgotten their contents, he possibly came to town to have any doubts removed. Roberts read both instruments over to him, when he expressed himself quite satisfied, and said he desired no alteration to be made in them. Roberts adds, that he was then in as sound a state of mind as he had been on the 10th and 11th of July. If ever so many proofs had been brought, that afterwards, when his faculties were impaired, he had forgotten the contents of those instruments, it would plainly be immaterial to the point in controversy.

In a case of this description much depends upon the character and prevailing humour of the

person who is alleged to have been the dupe of designing men, or to have been worked upon by improper influence. But I am bound to say, that here the evidence tends to show the improbability of any such practices succeeding had they been resorted to. The Admiral appears to have been a very different sort of person from what designing men would select for their prey. It is proved by the principal witness for the bill that he was of an obstinate disposition, more so, indeed, than almost any one whom we hear of in real life. Far from easily taking a suggestion, or adopting advice given, it was enough to make him do a thing that you desired him to abstain; and it is said that the family used to endeavour to lead him, upon this principle, by a kind of rule of contraries. This account is probably exaggerated, and if it be deemed calculated to meet the evidence that Roberts tried to dissuade him from making the deed, (of which evidence the plaintiff had notice in Roberts's answer,) it must be admitted to be far too great a refinement, and one which at all events cannot be imputed to Roberts, without positive proof that he knew of the strange peculiarity deposed to by Miss Hunter, and one on which even then he must have been a very weak man and an unskilful plotter to have acted. For how could he tell that the Admiral would not take him at his word, and acting for once like other men, listen to the exhortation, and thus defeat the object of the supposed conspiracy? It is assuredly not upon any such nice speculations, such far-fetched refinements, that men act

who are engaged in plots of this vulgar kind. Then, can any one doubt, that with all its exaggerations, this account presents us with the picture of a man singularly unlikely to become the dupe of entreaty or the victim of persuasion, and defended, more than most men, as it were by the peculiar constitution of his mind, from the influence of such artifices?

The question has been asked, did not the Alderman disclose to Mrs. and Miss Hunter the nature of the arrangement which had been made? and if he did not, an inference is drawn against him. So too, it is said, he ought to have apprized Mr. Macduffie of it. I greatly doubt if such disclosures would have been consistent with propriety and good faith. From his own family the Admiral had carefully kept the state of his pecuniary affairs concealed, and he had once and again informed the Alderman of the stratagems to which he resorted for this purpose. It is by no means clear that the Alderman would have been justified in making them acquainted with his friend's whole concerns, including his testamentary dispositions. Had he in like manner committed the information to Mr. Macduffie, the Admiral might have had reason to complain. No person is willing that any one should be made acquainted with the contents of his Will, save those whom he chooses himself to let into the secret.

I find that the Master of the Rolls considers it to be established in evidence, that between the preparation and execution of the deed, Mr. Roberts had a communication with the Alderman.

For this, or any thing like this, you will look in vain through all the evidence tendered here before me. But in that which was read below—the deposition of Mr. Martineau—there is a good deal of important matter, which is clearly not evidence at all against the defendants Atkins. I have read it, and there is nothing that I can find which at all proves the communication referred to by his Honor. There are several things stated as having been said by Roberts, which are not evidence, nor any thing like evidence, against the Messrs. Atkins, but which also, in my opinion, ought not to have been given in evidence against Roberts himself. Offers leading to a compromise are always, when attempted to be proved, rejected by judges. Communications obtained from a party by an attorney, especially communications from one who is himself acting as the adverse party's solicitor, are regarded by all judges, when proved by a professional man, or his clerk, with an evil eye. That any one should have made the kind of statements imputed to Roberts is eminently unlikely, and they most probably were accompanied by expressions which have escaped the witness's recollection, and which, if given, would have lent a very different aspect to the whole. But no means were afforded of refreshing Mr. Roberts's recollection on these things. Mr. Martineau, who gives in his examination the account of what Mr. Roberts told him, does not instruct his draftsman to interrogate that gentleman,^(a) in the bill, to

(a) The Counsel who had prepared the bill said at the bar,

these conversations; and the draftsman of the defendants cannot even frame cross-interrogatories to examine Mr. Roberts as to the parts of the conversation which he may have omitted, because it could not be foreseen what Mr. Martineau was to depose. Nothing, therefore, less to be depended upon can well be conceived than such an account so given. It is, I repeat, not admissible in evidence at all against the defendants Atkins; but if it were as against either the defendants Atkins or Mr. Roberts, were his case now before the Court—it could be of no avail whatever, and would not entitle us to ground any thing like an inference upon it. Yet, in no other part of the evidence can I find any semblance of a warrant for his Honor's very material assumption, that a communication between Roberts and the Alderman is proved to have taken place between preparing and executing the deed.

Upon the whole I am of opinion that the decree must be reversed. It is enough to say that the circumstances of the case do not warrant us in ascribing the deed in question to undue influence, or influence improperly exerted over a person either of insufficient understanding, or under the control or management of another—the dupe of his artifices, or the victim of his contrivances,

after the judgment was delivered, that he had received in his instructions a statement of the whole of the circumstances afterwards embodied in Mr. Martineau's evidence, and that he had framed the interrogating part with the omissions in question. This removes from Mr. Martineau the charge of having held back the evidence till he was examined.

or subjected to his sway. The bill, therefore, must be dismissed. But I will not give the costs, although there have been imputations of a grave nature upon the principal defendant's character, and for this reason—the ill-advised conduct of the Alderman, after Admiral Hunter's decease, in repeatedly refusing the particulars sought, unavoidably excited suspicions, and may probably have occasioned the suit. Something of this may be ascribed to the manner in which, from what passed between Messrs. Roberts and Martineau, it may be supposed the demand was made. No improper motive, we are now entitled to say, gave rise to the reluctance. But, unfortunately, until the matter was sifted the suspicions remained, and to this must be added the circumstance of Roberts being the Alderman's solicitor. Therefore I consider it a case for dismissing the bill without costs.

In stating this, I have specified the whole extent of the blame or the indiscretion imputable to the defendants. Their character appears to me, after a careful examination of the evidence, to remain untarnished. It is not enough to fix imputations upon the honesty or the honour of any man, that he might have made a sacrifice of his interest from a high sense of delicacy, or abandoned his rights out of kindness towards others less affluent than himself. Those may, perhaps, have themselves to blame for his struggling against their obtaining the sum in contest, who first directed towards his solicitor the language of invective and menace, and afterwards made the

subject of the dispute not so much the pittance at stake as the reputation of the party: and as for any censure to be cast, or rather any praise to be withholden, because he did not in the earliest stage prevent the gift, or at once abandon it to the family—such considerations belong not to the province of Courts of Justice,—they fall within that of the moralist. Yet, even there, I know not that any benefit accrues to the interests of sound morals by confounding together those things which are justly objects of blame, and those things which only are disentitled to applause. By pitching our standard of approbation extravagantly high, and treating as delinquents all who have failed to earn the encomiums of romantic excellence, we may truly be said to remove moral landmarks, and to discourage men from attaining that measure of virtue which is within the reach of all, by maintaining no boundary in our estimation, making no difference in our judgments, between the actual wrong-doer and him who only fails to reach those loftier summits which so few can gain.

MORGAN v. HOWELL.

THE Vice-Chancellor had directed a cause to stand over with liberty to amend by adding parties, and this was an appeal from His Honor's order, upon the ground that the objection, which was taken by the defendant, and was shown by the depositions of his witnesses, was in his knowledge when the answer was put in, and ought to have been there raised.

LORD CHANCELLOR.—A difficulty arose in this Feb. 24, 1834. case chiefly from the defendant having omitted in his answer to set forth that a lease of 11th August, 1823, and which the bill sought to have delivered up to be cancelled, had been before the commencement of the suit deposited by him, as a security with one W. Muster, upon the advancement of money. This matter coming out in the defendant's depositions, and it further appearing that E. Muster, the personal representative of W. Muster, was now out of the jurisdiction, and had the lease with him, and these facts not being, as they might have been, put in issue, it seemed difficult to act upon the objection which the defendant made, and which has been represented as forming the ground-work of the order appealed from. I took time, therefore, to consider the subject, and am now enabled to state, that I think the difficulty does not exist, and that the decree must stand. The bill was filed 30th March, 1830, and the answer was put

in 25th November, 1830; and it admitted a copy of the lease to be in the defendant's possession, and soon afterwards there was the usual order to produce the copy, of which possession was so admitted by the answer, but no time was specified, and the order was silent as to the original lease. There then was a further application to produce the lease itself within a week, or to deliver a true copy, or to swear that the paper deposited, or to be deposited, was a true copy. Upon this last motion an affidavit was sworn and filed, 18th June, 1831, stating distinctly an agreement of 9th January, 1830, with W. Muster, to deposit the lease for securing the repayment of the sum by him advanced; and that the lease so deposited was now in the hands of E. Muster, his personal representative, who is at Bruges in the Low Countries. An order was, on the 28th July, 1831, made on the ground of this affidavit, and referring to this affidavit: and this order stands unappealed from, and is an order in the cause. It directs the copy only, and does not order the original to be given up or deposited; and plainly because the Court saw that it was deposited with a purchaser, or at least an equitable mortgagee, *ante litem motam*, the deposit being 9th January, and the suit commenced 30th March, 1830. When the cause came on for hearing, an order was made, dated 20th December, 1831, the only one under appeal, and it directed the cause to stand over with liberty to amend by adding parties. It is suggested that the plaintiffs at first considered this order to be, as indeed it was, in

their favour. However this may be, under cover of it, they made such extensive changes in, and additions to, the bill, that his Honor the Vice-Chancellor, on an application for the purpose, directed it to be taken off the file. Upon this they appealed from the order itself,—not from that directing the bill to be taken off the file,—but from the one of 20th December, 1831, in their favour, and allowing them to supply the defect in their original bill by adding parties. I think that the Vice-Chancellor was entitled in these circumstances to take into his consideration the order made in July, and which now stands unquestioned; and he was also entitled to regard the grounds of that order. In truth, there could be no decree directing the lease to be given up to be cancelled, when the Court was made fully acquainted with the fact of its being impossible to do so, and that this impossibility arose from no act done *pendente lite*, but from a title to the possession of the instrument acquired by a purchaser or equitable mortgagee for value—a title paramount to any which this suit can give the plaintiff, either to the production or the cancelling of that deed. This fact came regularly enough to the knowledge of the Court, and was made the ground of the order of July, and which now stands.

I must therefore dismiss the appeal with costs.



WILLIS v. YATES.

Feb. 27, 1834.

Petitions of appeal ought not to suppress material facts, especially steps of procedure.

A party having acquiesced in the cause being heard below, on the question of costs only, cannot afterwards be permitted to appeal from the decree.

Bill being dismissed, an Injunction falls with it, without special order.

LORD CHANCELLOR.—A bill was filed, the prayer of which was for an injunction to restrain the defendants from proceeding to sink a certain pit, or making a communication between that and another pit, and from driving a back tunnel, and generally from doing any thing whereby the water from the defendants' mines might be drained into the plaintiffs' levels.

I have here to observe that the copy of the Petition of Appeal, with which I am furnished, is even more than usually, and that is saying a good deal, slovenly in the copying; for I must of course believe that the fault lies in the copying. The prayer is unintelligible. It is that the defendants should be restrained from making a communication between the pit marked E., and from driving a back tunnel, without saying to what other pit the communication should be forbidden to be made; that is, leaving out the only thing which is very material in the prayer. On looking at the Bill itself, we find that the words "and the pit marked C." are omitted. So the date of filing the answer is left in blank. Moreover not a word is said that I can find in the petition of any injunction having been granted, though much turns upon this, and it is admitted to have been granted 10th November, 1826, on filing the bill. It would be much better to have no such

thing as petitions, or at least not to go through the mockery of delivering a copy of them, if they are to be transcribed after so slovenly a fashion. If this practice be persisted in much longer, I shall be under the necessity of taxing the party with costs in some shape, either for presenting a petition suppressing any material facts, especially steps of procedure, or for giving in an imperfect copy of the petition. The Courts of Law will not suffer a case to be argued, if the Paper Books do not contain a statement of the points; no such facility is given to the Courts of Equity. They are to find then all the points from the facts; but it is in vain to suppose that any Court can discover what points are to be raised before it, if the very facts be suppressed upon which the points are to be made; and whether this omission consists in the petition itself being wrong drawn, or in the copy delivered being carelessly made, comes to exactly the same thing as far as the Court is concerned.

However, the defendants put in their answer, and after replication and evidence taken, the cause comes on to be heard upon the question of costs only. This is stated in the petition of appeal, which sets forth that the plaintiffs admitted that they desired to be heard on costs only. And it is not disputed that the plaintiffs would have agreed at once to dissolve the injunction, had the defendants made any objection to the cause being heard on costs alone, and required to go into the merits. Neither party then demand to be heard on any thing but the costs, and by their common consent, that alone was the question be-

fore the Vice-Chancellor. His Honor accordingly did hear the cause on that matter alone, and on that matter alone he made his decree, that the costs of the plaintiffs should be taxed and paid by the defendants. No objection was made by the defendants to this course of proceeding, till the decree went against them, when they thought fit to appeal. Can any one doubt of these three propositions? 1. That this was a question of costs below, and of nothing more; 2. That the defendants never dreamt of making it any other kind of question as long as they had a hope of prevailing on the matter of costs; and 3. That this appeal is on costs and nothing else.

No motion, nor any application or suggestion to the Court below, was ever made to dismiss the bill. The plaintiffs did not desire to continue their injunction, and were willing to dissolve it; but they contended that, in the circumstances of the case, they had a right to their costs. The defendants met them on this ground, as indifferent apparently as the plaintiffs to the continuance of the injunction, and only solicitous about the costs. His Honor heard the question, the only one before him, fully argued and decided against the defendants. That much of the case may have been gone into upon the merits there as well as here, I can well believe; for on costs there is hardly any part of a case into which you may not go. But, assuredly, all that was urged on the merits, was brought forward not on its own account, but as argument for or against costs. That the decree wears a somewhat irregular

appearance, disposing only of the question of costs, and saying nothing of the suit, must be admitted. But whose fault is that, and who has the right to complain of it? Certainly not the appellants and defendants, who knew that the only question raised below was costs, and that on costs alone the judgment was pronounced. It is further material to observe that the plaintiffs, as far back as January, 1831,—the hearing and decree being twelve months later,—offered to have the bill dismissed, without costs, which the defendants refused. This clearly evinces that if ever there was a question of costs, and nothing else, it is this.

If the bill had been dismissed, I am of opinion that the injunction would have fallen with it, and that no motion or order would have been necessary to dissolve it. This was clearly the view which Lord Eldon had of the matter in the precedents which I had from the Registrar's Office at the hearing of the appeal, and which I then read in Court. The case is manifestly different from that of orders impeachable for irregularity, and which stand until impeached and set aside. Here the injunction depends upon the suit, and must follow its fate. But to decide this point is quite unnecessary in the present case; for it is not asserted that the defendants applied to have the injunction dissolved, nor is it denied that the plaintiffs would at once have acceded to such a request.

This, then, being an appeal upon costs in the strictest sense, it comes within the rule. Not that

there can be no case in which such an appeal may be entertained : where special circumstances are shown, such as want of jurisdiction, or breach of a known rule, whereby the discretion of the Court is almost bound, an appeal will lie; and if there be a ground, a real and substantial ground, upon the merits, and not one colourably put forward as a cover for attempting to alter the order made below upon the costs, this purpose may be accomplished, although the rest of the decree stands. But all the cases, even those where such appeals succeeded, as *Jenour v. Jenour*, 10 Ves. 562; *Cowper v. Scott*, 1 Eden, 17; *Owen v. Griffith*, 1 Ves. sen. 250, plainly state that the rule is general, though not absolutely inflexible, and that the special circumstances to take any case out of it must be strong; and some of those cases where the rule was applied and the appeal refused, as *Wirdman v. Kent*, 1 Bro. C. C. 140, were accompanied with circumstances of a somewhat peculiar kind, and yet those were unavailing to create an exception. I have no doubt whatever that the present case is within the rule, and that the appeal does not lie. If it did, I see no reason to doubt the soundness of the conclusion to which his Honor came upon the question of costs, and should have affirmed the judgment had I been called upon, or indeed, I should rather say, were I entitled to go into it. Such was my opinion at the argument, but I wished to look into the pleadings and evidence, as I heard only the appellants. This further examination has confirmed the opinion I then entertained.

The only point on which I doubted was, what should be done with the injunction, and with the costs of this appeal:—with the injunction, because the decree leaves it untouched, and the suit still continues, though the costs up to the hearing have been disposed of;—with the costs of the appeal, because it seemed that the plaintiffs might have precluded even the pretext for an appeal, by themselves moving to dissolve, when they had obtained all they had any interest in having decided. As to the injunction, the better way will be to dissolve it now by consent; but if the defendants throw any difficulty in the way of this, they must seek their remedy where they shall be advised, and will have themselves to blame for any impression which the injunction may make upon their title, or any other inconvenience it may work to them. As to the costs, the defendants must pay them in this appeal; for I think the offer of January, 1831, relieves the plaintiffs from any observation that might otherwise have arisen (and which at one time did press upon me) regarding their not moving to dissolve at the hearing below.

DOWELL v. WILSON.

Two questions were here raised. The one, upon a will, as to the abatement of two legacies in exoneration of the residue. The other, upon some letters, as to an undertaking to pay a sum towards the education of infants. The judgment gives the full effect of passages in the will and letters upon which the questions depended.

Feb. 27, 1834.

Two legacies, the one to a natural brother, the other to a niece, with a direction that in case of loss in the amount of property (which happened) the same should be reduced 100*l.* less each than mentioned.

Held, notwithstanding there was residue sufficient for the satisfaction in full, that each legacy must, under the circumstances, abate in a sum not exceeding 100*l.*

A recommendation by letter of the education of infants, with an assurance that the writer was willing to go himself towards its object as far as a certain sum, construed to be a promise to pay that sum for the purpose.

LORD CHANCELLOR.—John Dowell, by his will, bequeathed to his natural brother George Dowell, the plaintiff, 400*l.*, to be paid to him only in case he lived to return to England. This legacy, therefore, did not vest until his return, which happened in 1828, the testator having died in 1820. There is a further direction, that in case of loss in the amount of property, George Dowell's share, and the share of Maria Dowell, a niece of the testator, who had previously been left the like sum of 400*l.*, should be reduced 100*l.* less each than mentioned. This direction would, therefore, in a certain event, reduce each of these legacies to 300*l.* It is worded somewhat obscurely, and the literal sense would not be very rational, viz. that, if the property left by the testator suffered any loss whatever, each of these legacies should thus abate. On the other hand, I think, if we were to construe it as referring only to such a loss as would leave insufficient to pay the legacies, we should go against the intention, for the

residue is in the testator's contemplation; he divides it equally among the five children of his brother Thomas, and directs it to be laid out for them, and they are manifestly special objects of his bounty. It is, therefore, unlikely that he should only provide for the abatement of the legacies in the event of there being no residue. But besides, there are other legacies; there are two legacies of 20*l.*, and there are also legacies of 20 guineas each to the three executors, and all these must of course abate, were a failure of residue in view: and it would have been absurd to provide for the case of the fund being deficient to pay those two legacies of 400*l.* only. On the other hand, had the intention been, to throw the deficit on the two legacies of 400*l.*, and save the other five legacies, amounting to 103*l.* in all, the testator would obviously have directed those two legacies to abate 51*l.* 10*s.* each. The naming of the two legacies of 400*l.*, and of the particular sum of 100*l.*, shows that he intended to increase the residue; and we must, therefore, read it as a direction, that each of the two legacies of 400*l.* should abate to an amount *not exceeding* 100*l.* in case of the property suffering any losses.

When George Dowell heard of the death of his brother, he wrote letters to two of the executors, full of kind expressions respecting the children of Thomas, indicating a disposition to assist them as far as he could, and professing his willingness to "sacrifice a great deal that they should be brought

up respectably and well educated." The executors having written to him in answer to these letters, he wrote another to them, dated 9 April, 1822, at Calcutta, and this they received in October. He refers to the legacy of 300*l.* which, either from an oversight or from their construction of the clause, they had told him was left him — says he cannot foresee his being in want of it on his return, but adds, even so (that is, if he should be in want of it,) he would rather it should be of benefit to educate the children, as he looks forward to a successful voyage, and to be able to advance them in life; but (he says) much depends on their education, and he, therefore, strongly recommends that essential point to their attention, and begs to assure them, that he is willing to go himself towards its object as far as 50*l.* per annum, and the rest of the letter is full of kindly expressions towards the family. I think the only construction that can be put upon this letter is, that it imports a direction to the executors to pay 50*l.* a-year to the extent of his legacy. He is writing to them as persons having the charge of the children, and is giving directions as to their education. The executors had no concern with the children, except as executing their uncle's will, and independent of the legacy; and supposing no legacy had been left to George Dowell, a direction by him to lay out so much money on the education of the children would have been sufficient, if complied with by the executors, to charge him in account with them. Now, is not

this passage in the letter a direction? "I strongly recommend their education to your attention, and I beg to assure you, that I am willing to go myself, towards its object, as far as 50*l.* a year." The mention of a specific sum takes away all pretence, as it seems to me, for treating this as the mere expression of a good will, or general intention afterwards to give; it shows that the intention had ripened into a gift. The preceding part of the passage, where he says, he had rather his legacy of 300*l.* should be of benefit to educate the children than use it himself, might not have been sufficient of itself, but it confirms the construction put on the latter part, while it fixes a limit to the payment of 50*l.*, and entitles the executors to set their payments against his claim to the legacy. But it is said, the executors did not so consider the letter, and that their answer repudiates the authority, alleged to be given, of paying for the children to the extent of the plaintiff's legacy. I do not regard their answer to the letter in this light; it seems to me not at all inconsistent with their having put what appears the only natural and reasonable construction upon George Dowell's letter. The legacy, out of which he desired them to pay for the children, was not vested, and might never become vested. This, they tell him, and therefore, say they, in the uncertainty of your ever reaching England we cannot touch it, however much we may be inclined to do so; but, they add, "whatever we can do for you shall be done, and we will not lose sight of any thing that can be done for the

children, as far as our own means will admit." If George Dowell did not return to England, the legacy fell into the residue, which went among the children. If he did, the legacy became payable, and then they might very fairly consider that the authority he had given would operate so as to repay them their advances, according to his directions. Although they do not express themselves with perfect distinctness, and do not in terms say, "we pay as you desire us, but we do not think the security you give us of your contingent legacy so good as you seem to do, who treat it as if it were vested; nevertheless, we shall pay, and take our chance:"—Yet it seems much more reasonable to suppose that this was not merely their meaning, in writing the letter,—for that is comparatively immaterial,—but their intention in paying the money, than to suppose that they paid above 400*l.* of their own money, because he desired them to pay 300*l.* on his account. The circumstance that this only gave them a lien upon a contingent legacy, was no reason why they should reject such a security altogether, and pay without any idea of repayment, when he bound himself to repay in the event of his returning home and obtaining the legacy. If we ought not easily to presume donation, and so to lean against any construction of George Dowell's letters which imports a gift; in like manner ought we to lean against a presumption of the executors giving out of their own monies: and yet, if the plaintiff's construction of this letter is to be adopted, we

make the executors give so much, and reject the chance of repayment offered by George Dowell.

I think, upon the whole, that they must be taken to have paid the money in consequence of George Dowell's letter. Whether or not they would have had to bear the loss themselves, had the legacy never vested in him, we have no occasion to inquire. At least they paid at his special instance and request, with reference distinctly made to a particular fund in case that should ever vest, and the fund having vested, and being in their hands to administer, they may retain it in account with him.

I have stated, with a view to the argument in the case, the construction I am disposed to put on the clause of abatement, as to the legacies of George Dowell and Maria; but this does not interfere with the part of the decree which directs an inquiry as to the loss sustained by the estate from the insolvency of the grantor of an annuity ultimately worth 1000*l.*, and which loss seems to have occasioned the abatement. That inquiry is necessary. But I think one part of the decree may require alteration, or rather addition. It declares the plaintiff entitled to a legacy of 400*l.* or of 300*l.*, subject to the directions thereafter mentioned; but it does not declare the construction of the abatement clause, so as to enable the master to find whether the legacy is 400*l.* or 300*l.* He may, indeed, report in the alternative, and the Court decide on further directions; but I conceive it would have been better to give the construction. Say that there shall be deducted

from the legacy of 400*l.* a sum equal to one half the loss which the estate shall be found to have sustained, not exceeding 200*l.* This has, however, not been argued here, and possibly not below, and I throw it out for the consideration of the parties; should they not agree it must be reserved for further directions.

Subject to this I affirm the decree with costs.

CASAMAJOR *v.* STRODE.

THIS motion arose out of the judgment in the same suit reported before, page 418.

For the motion, Sir E. Sugden. Against it, Mr. Solicitor-General and Mr. Knight.

March 4, 1834.

The Court will not discharge a purchaser from his contract for one lot on the ground that the title to the other is bad, unless it be satisfied, upon a full examination of all the circumstances, that he would never have bought except in the expectation of possessing both lots.

In general, this objection on the part of a purchaser to the completion of his agreement is not such as ought to be discussed upon motion.

LORD CHANCELLOR.—This was a bill filed to establish the will of Mr. Strode and perform the trusts of it; the principal of which was, to sell his real estates and apply the proceeds to certain purposes. The usual decree was taken, and it was referred to the master to take an account of the estates devised to the parties, and it was directed that the same should be sold with the master's approbation, and the consequential directions were given. The estates were accordingly brought to sale, and Mr. Drake became the purchaser of lots 25 and 30, and by an order in March, 1815, it was referred to the master to see if a good title could be made to those lots. Objections were taken, and some being removed, the rest were persisted in

before the master, who ultimately reported against them, and that a good title could be made to both lots. Against this report exceptions being taken, the Vice-Chancellor overruled them, and upon an appeal I was of opinion, that the whole of the exceptions taken were invalid save one, respecting a certain right or alleged right of warren, in respect of which a considerable portion of lot 25 had been awarded under the inclosure act, forming the origin of this branch of the title. With the assistance of the Chief Justice of the Court of Common Pleas and Mr. Justice Bosanquet, I had this point again argued, willing, if it were possible, that an end should be put to this transaction, which had lasted a quarter of a century; and we were all of opinion that the objection was fatal; and that to lot 25 a good title could not be made. From the contract therefore, as to that lot, the purchaser is set free. And he now moves, not upon the ground of any of the other objections already discussed, and which have indeed been disposed of, not upon the ground of any defects in the title to lot 30, which he formerly pointed out, and on which the master inquired, but because lot 25 being gone, and he having purchased lot 30 after he had bought lot 25, and lot 30 having no mansion or buildings upon it which lot 25 has, the one cannot be conveniently occupied under him without the other; and he urges, that as he never would have bought lot 30, which consists of 58 acres of land merely, but for his having bought and hoped to possess lot 25, therefore he should be let off also as to lot 30. In a word, the objections hitherto



It is only suggested by arguments and observations, arising upon affidavits in the cause, and I am of opinion that it cannot in this form be successfully used by a purchaser seeking to be let off from his contract.

Although this is enough to dispose of the present motion, yet the importance of the question raised by the objection, in a country where so many sales in lots, by auction and otherwise, are continually taking place, and the conflicting doctrines which have been sometimes ventilated upon the subject, induce me to enter a little further into the discussion.

Two very opposite opinions have been stated upon it. Lord Kenyon is reported to have held (at *Nisi Prius*), that where a party purchases several distinct lots (there it was houses) at a sale, and the title to one of the lots cannot be made, he is at liberty to repudiate the whole; so that he shall be loose as to the other lots, while the seller is fast; and this upon the supposition that the whole contract is necessarily entire; *Chambers v. Griffiths*, 1 Esp. 150. That this is not a sound doctrine at law any more than in equity, I hold to be very clear. Lord Eldon is said to have so expressed himself in the case of *Drewe v. Hanson*, 6 Ves. 676, but, if so, it has escaped the reporter. The proposition is indeed in some measure sanctioned by a faint dictum, for it is nothing more, in an Exchequer case, *Boyer v. Blackwell*, 3 Anst. 656, where the party's counsel having suggested, that the purchaser had taken contiguous lots in confidence of having both, and

ought to have the option of opening the biddings as to the one if the other were taken from him, the reporter says, "the Court inclined to think this reasonable, but the purchaser chose to keep the other lots." This clearly proves nothing. The case of *James v. Shore*, 1 Stark. 426, before Lord Ellenborough, is distinctly contrary to *Chambers v. Griffiths*, which was no less plainly overruled in a late case in the Court of King's Bench, *Roots v. Dormer*, 4 Barn. & Adol. 77. It is to be observed that in neither of these cases was *Chambers v. Griffiths* cited, which strongly confirms a suspicion that arises from the very inaccurate account which Lord Kenyon is made to give of *Poole v. Shergold*, 2 Bro. C. C. 118; 1 Cox, 273, (for that is the case referred to in *Espinasse*,) that this report is not to be relied upon. If Lord Kenyon's reported opinion, but which he probably never held, carried the rule so much too far in favour of the purchaser, perhaps an opinion ascribed to Lord Eldon in the note to *Roffey v. Shallcross*, 4 Madd. 227, and there said to be mentioned in Sir Edward Sugden's *Vendors and Purchasers*, carries the rule almost as far the other way: it is, that purchases of different lots are not to be connected together, unless there has been an understanding that the buyer should not take any if he could not have all. Clearly such an understanding will suffice to blend the whole into one contract; but it seems equally clear that the same complication may be effected or rather evidenced, without any such understanding; that is, without any express

agreement to this effect. It is a question of circumstances; the lots may be connected from their nature; it may be shown that the purchase of the one was made with reference to the other. A mere suggestion of the party, a mere statement of his inclination or fancy, will not be sufficient; nor may the proof of any thing of a private nature, not known to the vendor, suffice. But where, upon matters known to both parties, the purchaser can ground his proof that the one transaction was dependent on the other, he complicates the two, so as to make the contract one, although there may have been no express statement that he was to take none if he might not have all. It is further to be observed, that Lord Eldon decided contrary to the opinion referred to in a case of *Ex parte Tilsley*, January, 1819, which is cited by Maddock in the above-mentioned note.

If we examine the authorities we shall find sufficient reason to conclude that this is the sound principle, placed in the middle between the two extremes of the opinions ascribed to the learned Judges whose names I have mentioned. We shall further find a constant confirmation of the grounds upon which I have stated, that the derivative objection now taken cannot be allowed to prevail without a more full inquiry.

Upon the greater number of the cases cited in support of the present objection, it was observed by Mr. Solicitor-General, that they related to the question of opening biddings, and therefore did not apply to this case. With that remark I do not agree. If the decisions are upon similar ob-

jections to the one received here; if they show that the purchaser of a lot on which the biddings are not opened, is let off, because having but one, he needs not take the other, on account of certain circumstances connecting the two together; undoubtedly those decisions are strictly in point here; for the purchaser would be bound to take the lots on which the biddings had not been opened, but for the order releasing him. *Roffey v. Shallcross* is not at all decisive of a question like the present. For that was the purchase of 2-7ths of an estate in one lot, and if a title could only be made to 1-7th the purchaser had clearly not got that which he desired to have, viz. 2-7ths; and no proof was requisite to show that the part with, and the part without, title were complicated together so as to make the purchase joint (for the parts were undivided parts, and were in one lot,) even more than if a title could only have been made to half the number of acres in one lot. Accordingly the decree, which is given in one of Mr. Belt's notes to *Poole v. Shergold*, sets forth their lying in one lot as the ground. The principle adverted to rather than laid down in *Price v. Price*, 1 Sim. & Stu. 386, cannot certainly be assumed as the ground of an inflexible rule, that where, one lot having been bought before another and the title to it fails, the purchaser shall be let off from the second purchase, upon the ground that it must be concluded he would not have bought the second had he not reckoned on having the first. This circumstance of the one purchase being subsequent to the other

by the same party, may of course, no doubt, be the ground of a very strong presumption; but many cases may be figured in which it would prove nothing at all. The Court can only have treated it as a circumstance tending to show the connection of the two contracts. The application, there, was ~~not~~ on the motion, of the purchaser, but in consequence of the Court being moved to open the biddings. *Poole v. Shergold* was decided by Lord Kenyon at the Rolls, and his judgment is best given by Mr. Cox. To two lots no title could be made; the purchaser was of course let off as to these; and when he insisted on also being let off from the others, (the master had only reported as to them a case of compensation,) he only seems to have maintained, somewhat faintly, that he should not be compelled to take them, or at least not be ordered to pay costs. Lord Kenyon made him take all but the two to which there was no title, and he only said, that the Court had gone great lengths in compelling parties to proceed with their purchases, but that he clearly thought a case might be made where want of title to a part might be a sufficient reason for putting an end to the whole contract: and he cites the case of a buyer being compelled to take a part, though no title was made to another, which was the principal object in making the purchase, reprobating that decision (which was, I believe, one of Sir Thomas Sewell's,) in strong terms; he adds, however, that in the case at bar he was bound to suppose there was no such connection or complication between the lots, plainly because, as the plaintiff's counsel

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consequently not investigated, and on which there had been no reference to the master. In *Dalby v. Pullen*, 3 Sim. 29, the question of title arose in a suit to establish a will; and as to one of the points, the letting off a purchaser of a lot, to one undivided seventh of which a title could not be made, the case is only a repetition of *Roffey v. Shallcross*, to which I have already adverted. The rest of the case shows strongly that the present application cannot be granted without further inquiry. A reference of title having been there made to the master, he reported in its favour; and the money being directed to be paid into Court, all necessary parties were ordered to join in the conveyance. The title, however, was complicated; and a considerable time having elapsed before the conveyance could be completed, on the eve of the deeds being executed a claim adverse to the testator's title was set up; and it was moved, on the ground of this claim, to let off the purchaser. The affidavits stated the nature of the claim, and to be sure nothing could be more clear if the facts were true; for the testator's title, after some sifting, having turned out to be only as heir at law of his brother, five years older than himself, the new claimant was stated to be the son of an intermediate brother. It was further sworn on the purchaser's part, that the opposite party (the plaintiff) had stated his having been informed ten years ago, by his solicitor, an heir at law, other than the testator, being in existence. In answer to these affidavits, the plaintiff's solicitor only swore that, at the time of preparing the

abstracts, he believed the testator to be the heir at law of his elder brother, and had at that time never heard it questioned; and he added circumstances which had confirmed him in the belief of that fact. We can scarcely then conceive a case more clear than this stood upon the affidavits. In fact, those for the purchaser were wholly uncontradicted, and nevertheless the Court referred it back to the master, who was to receive such further evidence as the parties might think fit to adduce; and yet, with the exception that a good title had been reported before the discovery of the adverse claim, this was a fully stronger case than the present for calling upon the Court to decide without a further reference. It was a case too into which fraud entered somewhat largely.

We may, therefore, conclude that in determining whether a purchaser failing to obtain a good title with one lot, shall be let off from his contract for another, the whole circumstances may be examined, in order to prove that the two contracts are one, by showing that the two parcels are complicated together; and that upon the whole transaction, the Court will determine, as a jury would, the questions—Did or not the party purchase the one with reference to the other? Would he or would he not have taken one had he not reckoned upon having the other? The objection may be raised by being put directly in issue, or it may be raised before the master, according to the nature of the suit; but it cannot be raised and disposed of upon motion. Nor is it any exception to this rule, that where biddings are

opened against the purchaser, which was the case in *Price v. Price*, he may move to be relieved from his contract. In that case the purchaser does not take the objection by way of motion, as he is seeking to do here; but he is called upon to meet a motion against him in respect of one lot, and that motion he resists. Failing in his resistance, he then has no other course left but to apply for his discharge from the rest of his engagement. Mr. Drake cannot, therefore, have his present application granted; but he may carry in his new and secondary objection to the master. The costs of the motion must stand over till the report on the new objection comes in.

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